89-1955

Supreme Court, U.S.
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No. __-____

IN THE

Supreme Court of the United States

October Term, 1989

ALASKA AIRLINES, INC.,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated DISTRICT LODGE NO. 143, and its affiliated LOCAL LODGE NO. 2202,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Should this Court resolve conflicts between the circuits, and between the decision below and this Court's decisions, as to (1) whether an airline labor arbitrator has the authority to nullify unambiguous contractual language on the basis of the putative requirements of enacted legislation, specifically, the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, and (2) whether an airline labor arbitrator's award premised on the requirements of enacted legislation is immunized from judicial review solely by virtue of the arbitrator's bare assertion that the award "does not necessarily have to rely" on the requirements of enacted legislation?

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ALASKA AIRLINES, INC.,

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v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated DISTRICT LODGE NO. 143, and its affiliated LOCAL LODGE NO. 2202,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Alaska Airlines, Inc. ("Alaska")[1] prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit in *International Association of Machinists and Aerospace Workers, AFL-CIO, and its affiliated District Lodge No. 143, and its affiliated Local Lodge No. 2202 v. Alaska Airlines, Inc.*, No. 88-4079 (9th Cir. 1990).

[1] Alaska's parent company is Alaska Air Group, Inc. This representation is made pursuant to Sup. Ct. R. 29.1.

OPINIONS BELOW

The decision of the Ninth Circuit, reproduced at Appendix A, is unreported. The Ninth Circuit reversed the United States District Court for the Western District of Washington which had partially vacated the arbitration award ("Award") of the System Board of Adjustment ("System Board"), a joint labor-management arbitration panel. The district court's order, reproduced at Appendix B, is unreported.

JURISDICTION

The decision of the Ninth Circuit was filed on February 21, 1990. Alaska filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc*. On April 30, 1990, the Ninth Circuit denied Alaska's petition for rehearing and rejected Alaska's suggestion for rehearing *en banc*.[2]

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Railway Labor Act, 45 U.S.C. § 184, provides in relevant part:

> The disputes between an employee or groups of employees and a carrier by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition

[2] The Ninth Circuit's order is reproduced at Appendix C.

of the parties or by either party to an appropriate adjustment board, as hereinafter provided. . . .

It shall be the duty of every carrier and of its employees, acting through their representatives . . . to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may lawfully be exercised by system, group, or regional boards of adjustment, under the authority of Section 153 of this title.

STATEMENT OF THE CASE

I. Introduction

This case presents the issue of whether a labor arbitration award that is based on external law, without regard to the plain terms of the parties' contractual agreements, can be held to draw its essence from the parties' agreements. This case also presents the issue of whether such an award is shielded from judicial review simply by virtue of the arbitrator's pronouncement that the award "does not necessarily have to rely" on external law.

The district court partially vacated the System Board Award because (1) the contractual language at issue was clear and unambiguous and (2) the System Board exceeded the scope of its authority when it set aside and rewrote that contractual language on the basis of a perceived violation of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*

In reversing the district court's order, the Ninth Circuit recognized that the contractual language was clear and unambiguous. The Ninth Circuit nonetheless declared that the System Board had the authority to ignore the clear contractual language and instead "rely exclusively" on the RLA in issuing the Award. Based on this fundamental misperception of the scope of a labor arbitrator's authority under federal law, the

Ninth Circuit abdicated its duty to review the Award and determine whether it draws its essence from the parties' agreements.

This Court has held that an arbitration award may *not* be grounded solely on the requirements of enacted legislation. *E.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974). The courts of appeals, however, have taken divergent positions on the issue. This case affords this Court an opportunity to resolve the conflict between the circuits on the question of whether a labor arbitrator may rely exclusively on external law in rendering an award.

The Ninth Circuit's decision demonstrates the urgent need for clarification of the courts' role in judicial review of arbitration awards that are based on external law. Resolving the conflict between the circuits would promote the substantial national interest in the uniform, predictable interpretation of collective bargaining agreements and enhance the integrity of the arbitration process. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985).

II. The Contractual Dispute

Following a three-month strike in 1985 by the International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM"), against Alaska, the IAM and Alaska signed a Back-to-Work Agreement ("BTWA")[3] governing the return to work of former strikers in the mechanic, ramp service, and related crafts bargaining unit. Appendix D, at 1-4; Appendix E, at 2-3. The BTWA sets forth the agreement between the IAM and Alaska regarding recall rights of former strikers. The contractual language, appearing in paragraph 1.a of the BTWA, provides as follows:

> Striking Mechanic, Ramp Service and Related employees shall be recalled for service *after* the provisions

[3] The BTWA is reproduced at Appendix D.

> within the [collective bargaining agreement ("CBA")] for the filling of vacancies have been completed, but prior to the employment of new-hires, in order of classification seniority as openings occur. . . .

Appendix D, at 1 (emphasis supplied).

The BTWA declares unequivocally that former strikers are entitled to recall only "*after* the provisions within the [CBA] for the filling of vacancies have been completed, *but prior to* the employment of new-hires." Appendix D, at 1 (emphasis supplied). That is, the recall rights of former strikers are (a) subordinate to working employees' rights to fill vacancies pursuant to the vacancy-filling process mandated by the CBA, but (b) superior to the employment prospects of potential new hires.

Accordingly, former strikers awaiting recall are returned to work before new employees are hired, but do *not* compete with working employees in the filling of vacancies. The vacancy-filling process called for by the parties' CBA must be completed before former strikers' recall rights under the BTWA become operative. Appendix D, at 1.

III. The System Board Award

The System Board agreed with Alaska that the contractual language in paragraph 1.a concerning the recall rights of former strikers is clear and unambiguous.[4] Inexplicably, the System Board proceeded to claim to have "the right to rule upon violations of the RLA." Appendix E, at 34. The System Board's only stated foundation for this "right" was the assertion that "[t]his Board was established under the

[4] The System Board's Award is reproduced at Appendix E. The System Board's treatment of paragraph 1.a of the BTWA is found at Appendix E, at 34-35, 38.

RLA." Appendix E, at 34. On that premise, the System Board declared paragraph 1.a to be unlawful:

> The action [*i.e.*, the key language of paragraph 1.a] itself speaks much louder than the evidence or testimony presented. The sole purpose of such an act resulted in the denial of seniority rights to the striking employees. This action indicates union animus.

Appendix E, at 34.

Having stricken the assertedly unlawful provision of paragraph 1.a, the System Board then declared former strikers awaiting recall to be "employees" under the RLA who were entitled as such to bid on vacant positions *along with* working employees.[5] Appendix E, at 35. The System Board ordered Alaska "to place all striking employees who were eligible to bid on vacant positions into those positions and to pay the loss of earnings which resulted therefrom." Appendix E, at 35.

IV. The District Court's Order Partially Vacating the Award

Alaska moved to partially vacate the System Board's Award. Federal jurisdiction in the district court was based on 45 U.S.C. §§ 151 *et seq.* and 45 U.S.C. §§ 181 *et seq.* The district court granted Alaska's motion. Appendix B, at 1–7.

In its order, the district court examined the language of paragraph 1.a of the BTWA. The provision was found by the district court to be perfectly clear. The district court stated:

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[5] The System Board's view that paragraph 1.a indicated union animus and therefore violated the RLA may well have resulted from System Board reliance on the Eighth Circuit's decision in *Independent Fed'n of Flight Attendants v. Trans World Airlines*, 819 F.2d 839 (8th Cir. 1987), twice cited in the Award. Appendix E, at 33, 35. The Eighth Circuit was subsequently reversed by this Court in *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989), where this Court approved preferential job rights for working employees vis-a-vis former strikers awaiting recall.

> According to this provision, former strikers awaiting recall have employment rights ahead of new-hires, but do not participate with working employees in the filling of vacancies. The vacancy-filling process within the Collective Bargaining Agreement (CBA) must be completed before former strikers' recall rights under the BTWA become operative as to open positions that arise.

Appendix B, at 2.

The district court found that paragraph 1.a of the BTWA was clear and unambiguous and held that the System Board acted without authority when it "set aside and rewrote paragraph 1.a." Appendix B, at 6. The district court further ruled that the Award was impermissibly based on the asserted requirements of enacted legislation. The court concluded:

> The System Board in this case did more than interpret and apply the parties' Back-to-Work Agreement by looking for guidance to other sources. The System Board based its award on what it perceived to be the requirements of enacted legislation — the Railway Labor Act. . . .
>
> The System Board impermissibly used external sources to reach its conclusions, and it used these external sources to construe an unambiguous paragraph of the BTWA. . . . The System Board essentially set aside and rewrote paragraph 1.a of the BTWA rather than merely construe its meaning and application. In so doing it acted without authority.

Appendix B, at 6.

V. The Ninth Circuit's Decision Reinstating the Award

By decision filed on February 21, 1990, a panel of the Ninth Circuit reversed the district court and reinstated the contested portion of the Award. The Ninth Circuit, like the

System Board and the district court, recognized that the language of paragraph 1.a was clear and unambiguous. Appendix A, at 8–9. The Ninth Circuit nonetheless sanctioned the System Board's nullification of paragraph 1.a. Specifically, the Ninth Circuit announced that the System Board had the right to ignore the contractual language and "rely exclusively" on the RLA as the grounds for its Award.[6] Appendix A, at 7.

The Ninth Circuit also posited an alternative rationale for its approval of the System Board's dismantling of paragraph 1.a. Simply because the Award recited that the "decision on this [recall] issue does not necessarily have to rely on that [RLA] basis," the Ninth Circuit held that "the [Award] was ambiguous as to the extent of its reliance on the RLA." Appendix A, at 6. Having determined that the Award was "ambiguous," the Ninth Circuit abdicated its review function by refusing to examine whether the Award drew its essence from the parties' agreement. Instead, the Ninth Circuit held that, given the "ambiguity" ostensibly created by the Award's declaration that some second, unstated basis for its result might exist, the Award should *ipso facto* be affirmed. Appendix A, at 6.

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[6] The Ninth Circuit's ruling that the System Board had the authority to "rely exclusively" on the RLA in rendering its Award was apparently based, in part, on the Ninth Circuit's total misunderstanding of an earlier Ninth Circuit decision, in *IAM v. Alaska Airlines, Inc.*, 813 F.2d 1038 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987). The Ninth Circuit in the instant case misunderstood *IAM v. Alaska Airlines, Inc.* as (1) involving the "same contract" as the instant case, which it does not; (2) involving the "same issue" as the instant case, which it does not; (3) holding that an airline arbitration board has authority to sit like a federal district court and decide "RLA claims," which it does not; and (4) not sanctioning a striker-recall process wherein working employees have priority for job openings ahead of former strikers awaiting recall when, in fact, *IAM v. Alaska Airlines, Inc.* held that a striker-recall process identical to that set forth in paragraph 1.a does *not* violate the RLA. *IAM v. Alaska Airlines, Inc.*, 813 F.2d at 1038–41; Appendix A, at 6–7.

The Ninth Circuit thus created a rule whereby an arbitrator may ignore clear, controlling contractual language and premise an award on perceived requirements of external law. Further, the Ninth Circuit's holding allows an arbitrator to immunize such an award from any judicial scrutiny through the device of a cryptic declaration in the award that some second, unstated reason for the award may exist. The Ninth Circuit has abandoned the settled principle that an arbitration award must "draw its essence" from the parties' agreement.

REASONS FOR GRANT OF THE WRIT

I. Introduction

This Court's decisions in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-98 (1960), and *Alexander v. Gardner-Denver Co.*, 415 U.S. at 53, hold that a labor arbitration award based solely on the arbitrator's view of the requirements of enacted legislation fails to draw its essence from the parties' contractual agreement and is unenforceable. Yet, in cases challenging arbitral awards resting solely on the requirements of enacted legislation, circuit courts have reached conflicting results.

In the instant case, the Ninth Circuit recognized that the controlling contractual language is clear and unambiguous. Appendix A, at 9. The court still held that the System Board was empowered to ignore that contractual language and "rely exclusively" on the RLA in issuing its Award. Appendix A, at 7. This holding directly conflicts with decisions of this Court and decisions of other courts of appeals, which have held that an arbitrator may *not* disregard unambiguous contractual language and base an award on the requirements of enacted legislation.

Further, the Ninth Circuit abdicated its judicial review function in this case simply because the Award asserts — without any explanation whatsoever — that the Award "does not

necessarily have to rely" on the requirements of enacted legislation. Appendix A, at 6. Such abandonment of the court's duty because of an arbitrator's declaration of a potential, unstated reason for the award contravenes this Court's directive that the courts must ensure that an arbitrator's award draws its essence from the parties' agreements. Moreover, the Ninth Circuit's holding directly conflicts with decisions of other circuit courts, which expressly disavow an arbitrator's authority to shield an award from judicial review through the guise of a second, unstated rationale for the award.

Without further guidance from this Court as to the scope of an arbitrator's authority to rely on external law as the basis of an award, and without clarification from this Court as to the proper scope of judicial review of awards which parrot a second, but undisclosed reason for the award, similar cases in different jurisdictions will continue to breed dissimilar rulings. The need to resolve these conflicts between the circuits and to promote uniformity and predictability in the interpretation of collective bargaining agreements presents compelling reasons why this Court should grant the petition for a writ of certiorari.

II. The Ninth Circuit's Holding That the System Board Had the Authority to "Exclusively Rely" on the Requirements of Enacted Legislation as the Basis for Its Award Conflicts With Decisions of This Court and Decisions of Other Circuits

The Ninth Circuit's decision accords with both the System Board Award and the district court's order in one significant aspect. The Ninth Circuit, the district court, and the System Board all agreed that the language of paragraph 1.a of the BTWA is perfectly clear. Appendix A, at 9; Appendix B, at 4; Appendix E, at 34. Notwithstanding the clarity of that language, the Ninth Circuit anointed the System Board with the authority to nullify the language of paragraph 1.a of the

BTWA and "rely exclusively" on the RLA as the basis for its Award. Appendix A, at 7.

The Ninth Circuit's decision directly conflicts with decisions of this Court and decisions of other circuits, which hold that a labor arbitrator has no authority to disregard unambiguous contractual language and base an award on the perceived requirements of enacted legislation. In the specific context of airline system boards, the Ninth Circuit's decision conflicts with decisions of this Court and of other circuits which hold that only the federal courts — and not an airline system board — are empowered to decide statutory rights under the RLA.

A. *This Court and Other Circuit Courts Have Held That an Arbitrator's Award That Is Based on External Law Fails to Draw Its Essence From the Parties' Agreement*

This Court has held that a labor arbitration award "is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597. In contrast to the Ninth Circuit in the instant case, this Court has held that a labor arbitration award does *not* draw its essence from the parties' agreement if it is based on external legal sources, wholly without regard to the terms of the parties' contract:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement . . . . The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties . . . . If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced.

Alexander v. Gardner-Denver Co., 415 U.S. at 53 (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597-98); *accord McDonald v. West Branch*, 466 U.S. 284, 290-91 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 744 (1981). Thus, when an arbitrator disregards the plain language of the contract and instead renders an award premised on his or her view of the requirements of statutory law, as in the present case, the arbitrator has acted without authority.[7]

This significant limitation on an arbitrator's authority was also recognized by the Seventh Circuit in *Roadmaster Corp. v. Production & Maintenance Employees' Local 504*, 851 F.2d 886 (7th Cir. 1988). In *Roadmaster* the court partially vacated an arbitration award where the arbitrator found that the employer had violated Section 8(d)(2) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(d)(2), by refusing to bargain with the union prior to the contract's termination. Because of the perceived violation of law, the arbitrator ordered the collective bargaining agreement extended for one year. 851 F.2d at 888.

In affirming the district court's order vacating the arbitration award, the Seventh Circuit explained:

> [A]dvancing his view of his authority, the arbitrator indicated that in his opinion he was not only authorized, but required, "to apply applicable law in deciding issues in arbitration cases." . . .
>
> The arbitrator cast no doubt upon what he was doing. And he was plainly wrong. He based his decision not

[7] The same analysis applies even when contractual rights parallel statutory rights. As stated by this Court:

> [T]he arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by [statute].

Alexander v. Gardner-Denver Co., 415 U.S. at 53-54.

> upon the parties' bargain, but rather upon his "view of the requirements of enacted legislation." Thus, he has 'exceeded the scope of the submission' and the award will not be enforced.

Id. at 889 (citations omitted).

The view that labor arbitrators are limited to application of the contract and should not ground an award on the perceived requirements of external law was similarly embraced by the Third Circuit in *Graphic Arts International Union Local 97B v. Haddon Craftsmen, Inc.*, 796 F.2d 692 (3d Cir. 1986). In that case, the arbitrator rejected the union's invitation to base the award on the NLRA. The district court vacated the arbitration award because, in its view, the company *had* violated the NLRA. The Third Circuit reinstated the arbitrator's award, holding that the arbitrator had "properly disclaimed authority to consider the [statutory] issue and constrained herself to an interpretation of the terms of the contract."[8] *Id.* at 698.

Sound policy reasons exist for this limitation on an arbitrator's authority. The arbitrator is chosen by the parties as the "officially designated 'reader' of the parties' contract." St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137, 1140 (1977). It is the arbitrator's construction of the negotiated agreement, and not of external law, that the parties have bargained for.[9] An arbitrator's expertise is

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[8] A wholly different view of an arbitrator's authority has been taken by the Second Circuit. In *Ottley v. Sheepshead Nursing Home*, 688 F.2d 883 (2d Cir. 1982), the court held that an arbitrator did not exceed his power by basing an award on the NLRA rather than on the parties' agreement. The court rejected "a per se rule that denies enforcement of an award simply because it rests upon an arbitrator's interpretation of external law. . . ." *Id.* at 888.

[9] Professor Theodore J. St. Antoine has stated that:

> [R]ecognition of the arbitrator as the parties' official "reader" of the contract . . . clearly would resolve the perennial question

(footnote continued on next page)

grounded in his or her "knowledge of the custom and practices of a particular factory or a particular industry as reflected in particular agreements." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 596. As such, the parties rightfully expect that an arbitrator will base his or her award on the terms of the negotiated agreement.

Moreover, the parties' statutory rights may not be adequately protected by an arbitrator. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. at 743. Unlike a judge whose jurisdiction encompasses a broad range of legal issues, labor arbitrators are presumed expert only in the comparatively narrow area of collective bargaining and the "law of the shop." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). "Because the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land . . . many arbitrators may not be conversant with . . . public law considerations . . . ." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. at 743 (citations omitted).

This case exemplifies the mischief that an arbitrator can create by resting an award on the arbitrator's view of the requirements of enacted legislation. Where a union and the employer mutually agree, what public law considerations require invalidation of a contractual provision granting nonstrikers priority over former strikers in filling job vacancies? Why should an arbitrator be allowed to declare for Congress that such an agreement is impermissible as a matter of law, especially when this Court has reached the opposite conclusion? *See supra* note 5.

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of what the arbitrator should do when confronted with an irreconcilable conflict between the parties' agreement and the law. With a right good conscience, he should follow the contract.

St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. at 1142.

B. *This Court and Other Circuit Courts Have Held That the Federal Courts — Not a System Board — Are Empowered to Enforce Statutory Obligations Under the RLA*

In the specific context of RLA system boards, both this Court and courts of appeals other than the Ninth Circuit have held that the federal courts, and not a system board, are empowered to enforce statutory obligations under the RLA. These decisions cannot be harmonized with the Ninth Circuit's holding that the System Board had authority to "rely exclusively" on the RLA.

When a claim involves statutory obligations imposed by the RLA, courts other than the Ninth Circuit in the present case have held that jurisdiction lies with the federal courts and not a system board. *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952); *Railway Labor Executives' Ass'n v. Boston & Maine Corp.*, 808 F.2d 150, 157-58 (1st Cir. 1986), *cert. denied*, 484 U.S. 830 (1987); *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 917-18 (7th Cir. 1974); *Brady v. Trans World Airlines, Inc.*, 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969); *Texas Int'l Airlines, Inc. v. Association of Flight Attendants*, 498 F. Supp. 437 (S.D. Tex. 1980), *aff'd*, 667 F.2d 1169 (5th Cir. 1982).

A system board has no jurisdiction when RLA rights are at issue. "Congress ordered the establishment of [airline] system boards to hear and decide airline *contract* disputes," *not* statutory disputes under the RLA. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 695 (1963) (emphasis supplied). As the court stated in *Brotherhood of R.R. Trainmen v. Smith*, 251 F.2d 282, 285-86 (6th Cir.), *cert. denied*, 356 U.S. 937 (1958):

> Decision of this issue depends upon the meaning of the statute and over such a question the federal courts have jurisdiction. In *Brotherhood of Railroad Trainmen v.*

> *Howard*, 343 U.S. 768 [(1952)], the Supreme Court held that when a contract between the union and the railroad produced an illegal result the courts, and not the National Railroad Adjustment Board, had jurisdiction.

The rationale for this rule was articulated by the district court in *Brady v. Trans World Airlines, Inc.*, 223 F. Supp. 361 (D. Del. 1963), *aff'd*, 401 F.2d at 87. Recognizing that the enforcement of statutory obligations under the RLA was "entrusted to the courts," the court explained that:

> [N]o other agencies, *least of all the Adjustment Boards*, are either equipped or empowered to deal with conduct impairing the statutory right of employees to be free of coercion . . . .

223 F. Supp. at 365 (emphasis supplied); *accord Lum v. China Airlines Co.*, 413 F. Supp. 613, 614 (D. Haw. 1976).

C. *The Ninth Circuit's Holding That the System Board Could "Rely Exclusively" on the RLA Directly Conflicts With Decisions of This Court and Decisions of Other Circuits*

The Ninth Circuit now has essentially rejected the principle, adopted by this Court and other circuit courts, that an arbitrator's authority is limited to contractual interpretation. Federal courts in the Ninth Circuit are now bound to uphold arbitration awards which are rooted solely in the requirements of external law — whether the arbitrator's legal conclusion is deemed right or wrong. Moreover, arbitrators who render awards subject to Ninth Circuit review are now free to usurp the federal courts' exclusive jurisdiction to rule on statutory obligations imposed by the RLA. The Ninth Circuit's decision invites an arbitrator to embark on analytical adventures far outside the bounds of the contract.

Under the Ninth Circuit's ruling, parties to an arbitration proceeding may no longer rely on the arbitrator as the designated reader of their negotiated agreement. Instead, the parties must assume that an arbitrator is free to ignore the language of the negotiated agreement, sit like a federal district court, and base an award on the arbitrator's perceptions of the requirements of enacted legislation, such as the RLA and the NLRA. This unwarranted conferral of jurisdiction upon an arbitrator cannot be harmonized with decisions of this Court and the approaches taken by other circuit courts. The Ninth Circuit's ruling dangerously undermines the compelling national interest in the uniform interpretation of collective bargaining agreements and the use of labor arbitration as the preferred, peaceful means of resolving disputes in the workplace.

III. The Ninth Circuit's Decision That the Award Was Immunized From Judicial Review Simply Because the Award Declares That It "Does Not Necessarily Have to Rely" on the RLA Conflicts With Decisions of This Court and of Other Circuit Courts

The Ninth Circuit declined to discharge its duty to review the Award to determine whether the Award draws its essence from the parties' agreement. As the premise for its refusal to review the Award and apply the plain terms of the parties' agreements, the Ninth Circuit embraced the Award's recitation that "the decision on this [recall] issue does not necessarily have to rely on that [RLA] basis." Appendix A, at 6. On the asserted rationale that the System Board's second, unstated reason for the Award rendered the Award "ambiguous," the Ninth Circuit declared that the Award should be affirmed. Appendix A, at 6. The Ninth Circuit so held despite the court's recognition that the contractual language at issue was clear and unambiguous. Appendix A, at 9.

The Ninth Circuit's abdication of its duty cannot be reconciled with this Court's directive that an arbitrator's award

must "draw its essence" from the parties' agreement. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597. The Ninth Circuit's decision conflicts directly with decisions of other circuit courts, which hold that an award will not be immunized from judicial review simply because the award pays "lip service" to contractual interpretation.

A. *This Court Has Held That the Courts Must Ensure That an Arbitrator's Award Draws Its Essence From the Parties' Agreement*

Thirty years ago, this Court announced a well-recognized exception to the rule of judicial deference to arbitration awards. Courts will refuse to enforce an arbitration award when the arbitrator fails to confine himself or herself to interpretation and application of the parties' agreement:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. at 597.[10]

Accordingly, the deference afforded arbitration awards by the courts does not abrogate the court's duty to review such awards to ensure that the arbitrator interpreted the parties'

[10] A second exception to the general requirement that courts defer to arbitration awards is the rule that a court cannot enforce an award that is contrary to public policy. *W. R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 776 (1983); *accord United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987).

agreement. In reviewing arbitration awards, courts must examine the "arbitrator's words" to ascertain whether the arbitrator has strayed from his or her appointed task of "interpretation and application of the collective bargaining agreement." *Id.*

B. *Other Circuit Courts Hold That an Arbitrator's Recitation That a Second, Unstated Basis for an Award Exists Will Not Immunize an Award From Judicial Review*

In marked contrast to the Ninth Circuit's holding in this case, courts in other circuits hold that an arbitrator's mere recitation of a second, unexplained reason for an award will not shield the award from judicial scrutiny. In *Clinchfield Coal Co. v. District 28, United Mine Workers*, 720 F.2d 1365 (4th Cir. 1983), for example, the arbitrator's award failed to discuss critical contract language that might have required the opposite result. The union argued that, because the award recited the parties' differing positions on the issue, the award thereby drew its essence from the parties' agreement. Rejecting the union's argument, the Third Circuit stated:

> The Union's argument is wholly unsatisfactory for it would allow an arbitrator to shield his award simply by the ruse of stating an issue without discussing it.

Id. at 1369.

A similar approach was adopted by the Seventh Circuit in *Young Radiator Co. v. International Union, UAW*, 734 F.2d 321, 325 (7th Cir. 1984). In *Young* the Seventh Circuit held that an arbitrator had failed to confine himself to interpretation and application of the parties' agreement when the arbitrator nullified the employer's contractual right to discharge an employee for theft. The union argued that the arbitrator's award should be sustained simply because the award raised the possibility of an "unstated second reason for [the arbitrator's]

determination." *Id.* at 325. The Seventh Circuit rejected the union's argument, holding that the arbitrator's merely "rais[ing] the possibility" of an alternative basis for the award could not immunize the award from judicial review. *Id.; accord Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 187 (7th Cir. 1985) (making "noises of contract interpretation" cannot shield an award from judicial correction), *cert. denied*, 475 U.S. 1010 (1986).

C. *The Ninth Circuit's Abdication of Its Review Function Cannot Be Reconciled With Decisions of This Court and Decisions of Other Circuits*

Simply because the System Board asserted that its decision did "not necessarily have to rely" on the RLA, the Ninth Circuit held that the Award was "ambiguous" and *ipso facto* drew its essence from the parties' agreement. Appendix A, at 6. The Ninth Circuit apparently credited the System Board with a contractual interpretation by dint of the System Board's utterance that some second, undisclosed rationale may exist for its refusal to apply the BTWA as written. Appendix A, at 6. Such a result guts the courts' function in reviewing arbitration awards by immunizing an award from judicial review when the award states a potential issue but does not discuss it. The Ninth Circuit's holding cannot be reconciled with decisions of this Court and of other circuit courts holding that the courts must vacate awards which conflict with clear and unambiguous contract language and which hence fail to draw their essence from the parties' agreement.

This Court has stated that "a mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded the scope of his authority, is not a reason for refusing to enforce the award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 598. The System Board's Award in the present case,

however, does not involve a "mere ambiguity." The System Board clearly stated that the reason for its refusal to apply paragraph 1.a was its belief that paragraph 1.a violated the RLA. Appendix E, at 34. Violation of the RLA is, in reality, the *only* rationale given by the System Board for its refusal to honor and apply paragraph 1.a.[11]

[11] Ostensibly in the discharge of its review function, the Ninth Circuit recites certain criteria or phrases sometimes pertinent to judicial review of an award. The Ninth Circuit's decision thus refers to "looking to the parties' intent and relevant case law," "construfing] the[ ] interaction" of contractual provisions, and "construing the contract language in light of the intent of the parties." Appendix A, at 8. Despite their invocation, these labels have no application to the instant case unless it is first assumed that the System Board had the authority to find paragraph 1.a violative of the RLA and accordingly to refuse to apply the plain terms of paragraph 1.a.

The Ninth Circuit embraced "the parties' intent" and the "intent of the parties" as if such intent supported the Award. Yet, the only finding of intent by the System Board, as admitted in the Award and as noted by the district court, was Alaska's supposed anti-union intent as expressed in — and only in — the very terms of paragraph 1.a. Appendix B, at 5; Appendix E, at 34. The System Board then used that intent to justify nullification — and not application — of paragraph 1.a. An arbitrator's *factual* finding of intent (of which there was none in the instant case) based upon bargaining history, past practice, or concerns of industrial efficiency can properly be used to interpret contract language. *E.g., Edward Hines Lumber Co. v. Lumber & Sawmill Workers*, 764 F.2d 631, 635 (9th Cir. 1985), *cert. denied*, 475 U.S. 1131 (1986); *Loveless v. Eastern Airlines*, 681 F.2d 1272, 1280 (11th Cir. 1982). However, an inference of intent based only on plain contract terms obviously *cannot* aid in interpreting and applying the unequivocal contract language from which the inference derives.

The Ninth Circuit's decision refers favorably to an arbitrator's "looking to . . . relevant case law to interpret the language of the agreements." Appendix A, at 8. Yet, that is not remotely what the System Board did. It was only *after* the System Board invalidated paragraph 1.a as violative of the RLA that the System

(footnote continued on next page)

Although the courts' role in reviewing arbitration awards is limited, that role is not a meaningless part of the arbitration process. Narrow review "is not the equivalent of no review at all." *Miller v. Chicago & N.W. Trans. Co.*, 647 F. Supp. 1432, 1438 (N.D. Ill. 1986). Insulating an award from judicial review or correction merely because the award pays lip service to a potential second, unstated reason for the arbitrator's determination vitiates the role of the judiciary in the review of arbitration awards.

Application of the Ninth Circuit's rule would lead to irrational results and invite pervasive abuse of the arbitral process. An arbitrator would be able to immunize his or her award from judicial review — regardless of the true basis for the arbitrator's decision — simply by stating that "I considered the contract and I find a contractual violation." To characterize such a statement as a contractual interpretation, thereby immunizing the award from any judicial scrutiny, renders judicial review of arbitration awards a meaningless part of the arbitration process.

The Ninth Circuit's task in this case was to determine whether the Award drew its essence from the parties' agreements. That task was specifically to consider whether, in light of the admittedly clear and unambiguous language of paragraph 1.a of the BTWA, it was a plausible interpretation of the parties' agreement for the System Board to refuse to apply

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Board looked to case law to determine whether former strikers awaiting recall are "employees" under the RLA. Appendix E, at 35. Therefore, the System Board did not "look to" the law to *interpret* paragraph 1.a; it invalidated paragraph 1.a based on the stated ground of an RLA violation.

The Ninth Circuit's decision also alludes to "interpretation" and "construing" of the parties' agreements on the part of the System Board. Appendix A, at 9. But the System Board could be credited with "interpretation" or "construction" only *if* the System Board is assumed to have the authority to decide RLA violations and to thereby nullify paragraph 1.a.

paragraph 1.a to the precise situation it was designed to control, namely, the recall of former strikers to work. The Ninth Circuit's abandonment of its review function has caused Alaska to "lose in the arbitration process what it earned the hard way at the bargaining table." *S.D. Warren Co. v. United Paperworkers' Int'l Union Local 1069*, 815 F.2d 178, 185 (1st Cir.), *vacated & remanded*, 484 U.S. 943 (1987), *aff'd after remand*, 845 F.2d 3 (1st Cir. 1988). This result constitutes a severe penalty, indeed, when Alaska's sole transgression — according to the System Board, the district court, and the Ninth Circuit — was applying the terms of the parties' BTWA as written. Alaska is entitled to meaningful judicial review of the Award.

This Court now has the opportunity to unite the lower courts by supplying guidance as to (1) the authority of labor arbitrators to base awards on the perceived requirements of external law and (2) the role of the judiciary in reviewing arbitration awards that are based on external law but pay lip service to a second, undisclosed basis for the award. Clarification of these issues will enhance the national interest in consistent, equable arbitral interpretation and judicial review of collective bargaining agreements.

CONCLUSION

For the foregoing reasons, this Court should summarily vacate the Ninth Circuit's decision and remand the matter with instructions to affirm the district court. If this Court were to announce, as a matter of law, that the System Board had the authority to issue its Award based on the requirements of enacted legislation, then this Court should vacate the Ninth Circuit's decision and remand the matter with instructions to review the System Board's legal conclusion in light of *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989). Alternatively, this Court should grant the

Petition for Writ of Certiorari and give the case plenary consideration.

RESPECTFULLY SUBMITTED this 11th day of June, 1990.

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated District Lodge No. 143, and its affiliated Local Lodge No. 2202, Plaintiff-Appellant, v. ALASKA AIRLINES, INC. Defendant-Appellee.	No. 88-4079 D.C. No. CV-85-2140-WTM MEMORANDUM*

Appeal from the United States District Court
for the District of Western Washington
Walter T. McGovern, Senior District Judge, Presiding

Argued and Submitted January 11, 1990*
Seattle, Washington

Before: BROWNING, BEEZER, and RYMER, Circuit Judges

I

Appellant, the International Association of Machinists and Aerospace Workers ("Union"), and the appellee, Alaska

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Airlines ("Alaska"), submitted a dispute arising from a labor strike to Alaska Airlines' System Board of Adjustment ("Board") for arbitration, as provided under the Railway Labor Act, 45 U.S.C. § 184 (1982). Among other things, the Board found that Alaska's policy for recalling strikers to work violated the parties' agreements. On review, the district court granted Alaska's motion to vacate the award with respect to this issue. The Union now appeals the district court's order. We reverse and reinstate the Board's decision.

II

This case arose out of appellant's strike against Alaska Airlines from March 4, 1985, to June 3, 1985. During this period, Alaska hired "permanent replacements" for the strikers and filled other positions with non-striking employees.

On June 3, 1985, the parties entered into a new collective bargaining agreement and a back to work agreement. In early 1986, Alaska began recalling strikers to work. On October 30, 1985, the Union filed suit against Alaska in federal district court, challenging the recall procedure. The Union claimed Alaska's plan for reinstating strikers violated the parties' agreements, and sought a preliminary injunction barring Alaska from instituting the plan until after arbitration by the Board to determine the plan's validity.

The court refused to grant injunctive relief, finding that the Union failed to show irreparable harm. It found that the Board had jurisdiction to award full compensatory damages, and ordered an expedited hearing by the Board. In a related order clarifying its earlier order, the court ordered that all issues relating to the recall of strikers be presented to the Board.

The Board found that the back to work agreement, as interpreted by Alaska, conflicted with the parties' agreements and the Railway Labor Act ("RLA"). It held that the strikers

were to be considered employees until they found other work, and were entitled to bid on vacant positions on the same basis as non-striking employees. It also ordered Alaska to place all striking employees who were eligible to bid on vacant positions into those positions, and to pay the loss of earnings which the employees had suffered.

Alaska then filed a motion in the district court to vacate the portion of the Board's order addressing the recall issue. The district court found that the Board had exceeded its authority by looking beyond the terms of the back to work agreement to the parties' intents and to the RLA. The Union appeals this order.

III

We review the district court's order vacating the Board's decision *de novo*, keeping in mind the limited scope of federal courts' review of arbitration decisions. *See Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1204-1205, 1207-1209 (9th Cir. 1989) (*en banc*); *see also Hughes Aircraft Co. v. Elec. & Space Technicians, Local 1553*, 822 F.2d 823, 826 (9th Cir. 1987).

A

Federal district courts have limited jurisdiction under the RLA to review board decisions. 45 U.S.C. § 153, First(q) (1982); *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89, 93, 99 S. Ct. 399, 58 L.Ed.2d 354 (1978) (*per curiam*).

The district court based its opinion on the "failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction." 45 U.S.C. § 153, First(q). The court stated the issue as whether the Board "exceeded the scope of its authority," and found that the Board "failed to confine itself to interpretation and application of the parties'

agreement." E.R., Order at 4-5. Thus, the district court did not exceed its statutory jurisdiction in reviewing the Board's order.

B

The district court's standard of review of arbitration decisions is "among the narrowest known to law." *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563, 107 S. Ct. 1410, 94 L.Ed.2d 563 (1987) (quoting *Union Pacific*, 439 U.S. at 91); *United Food and Commercial Workers Union, Local 1119 v. United Markets, Inc.*, 784 F.2d 1413, 1415 (9th Cir. 1986) (citing, *inter alia*, *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960)); *see also Edward Hines Lumber Co. of Oregon v. Lumber and Sawmill Workers Local No. 2588*, 764 F.2d 631, 634 (9th Cir. 1985), *cert. denied*, 475 U.S. 1131 (1986); *George Day Constr. Co. v. United Bhd. of Carpenters and Joiners of Am., Local 354*, 722 F.2d 1471, 1477 (9th Cir. 1984); *Federated Employers of Nevada, Inc. v. Teamsters Local No. 631*, 600 F.2d 1263, 1265 (9th Cir. 1979).

The district court was not permitted to "reexamine the merits of the underlying grievances, . . . [or] overrule an arbitrator because [it] disagree[d] with the arbitrator's interpretation of the contract." *Edward Hines*, 764 F.2d at 634 (citing *Broadway Cab Co-op, Inc. v. Teamsters & Chauffeurs Local 281*, 710 F.2d 1379, 1382 (9th Cir. 1983)).

Appellant claims that the district court did not defer to the arbitrator's interpretation of the contract. This argument is intertwined with the district court's finding that the Board did not rely, as it was required to do, on contractual interpretation in reaching its decision. To evaluate appellant's claim, it is necessary to analyze the basis for the Board's order, keeping in mind the degree of deference required of the district court.

V

The district court found that the Board's order exceeded the scope of its authority in three ways: (1) the Board relied on the fact that the agreement violated the RLA, (2) the Board went beyond interpreting and applying the "clear language" of the parties' agreement and looked to the parties' intent, and (3) the Board looked to case precedent to interpret unambiguous language.

However, as long as the Board's decision "[drew] its essence from the collective bargaining agreement," the district court was required to defer to the arbitrator's decision. *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960).

A

An arbitration award does not "draw its essence" from the parties' agreement if it is "based on external legal sources, wholly without regard to the terms of the parties' contract." *American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986) (relying on *Enterprise Wheel*, 363 U.S. 593 and *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 103 S. Ct. 2177, 76 L.Ed.2d 298 (1983)). "If an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53, 94 S. Ct. 1011, 39 L.Ed.2d 147 (1974) (quoting *Enterprise Wheel*, 363 U.S. at 597-98).

Although an award may not be based "solely upon the arbitrator's view of the requirements of enacted legislation," the arbitrator "may of course look for guidance from many

sources." *Enterprise Wheel*, 363 U.S. at 597. *See, e.g., Edward Hines Lumber Co. of Oregon v. Lumber and Sawmill Workers Local No. 2588*, 764 F.2d 631, 635 (9th Cir. 1985) (upholding an award when "the arbitor thoroughly considered all relevant evidence presented to him" and "carefully analyzed the common law of the industry, looked at past arbitration decisions, and took into account economic considerations.").

The Board did not, as appellee argues, base its decision "solely" on the RLA. While the order stated the Board's erroneous opinion that "it has the right to rule upon violations of the RLA", it also clearly stated that "a decision on this issue does not necesarily have to rely on that basis." E.R., Exhibit A, at 39.

Given the Board's direct statement in its order that it was not relying solely on Alaska's violations of the RLA, the most reasonable reading of the order is that it is based on alternative grounds, each of which independently supports the Board's conclusion. At the very least, the Board's decision was ambiguous as to the extent of its reliance on the RLA. Assuming this ambiguity, the order should be reinstated. *See Enterprise Wheel*, 363 U.S. at 597-598; *accord Rossi v. Trans World Airlines, Inc.*, 507 F.2d 404, 405 (9th Cir. 1974). Even if one conceivable construction of the Board's order is that it relied primarily on the RLA, the award should still be affirmed. *See Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1208-09 (9th Cir. 1989).

Furthermore, a finding that the Board was unable to consider the contract's violation of the RLA would deprive appellants of any forum in which to bring their RLA claims in connection with the collective bargaining agreement. In a case related to the same strike which involved the same contract, the same issue, but a different group of employees, the Union argued that its suit was based on violations of the RLA, and was therefore within the court's, and not the Board's,

jurisdiction. *International Ass'n of Machinists and Aerospace Workers v. Alaska Airlines, Inc.*, 813 F.2d 1038, 1040 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987). This court characterized the issue as a "minor dispute." *Id.* *See Elgin, Joliet, & Eastern Ry. v. Burley*, 325 U.S. 711, 722-28, 65 S. Ct. 1282, 89 L.Ed. 1886 (1945) (Board's jurisdiction turns on whether dispute is "major" or "minor"). The court found that the dispute revolved around the collective bargaining agreement, and distinguished cases relied upon the Union by stating that in those cases, "judicial involvement was the only means of enforcing the RLA." *Alaska Airlines*, 813 F.2d at 1040. It found that the district court properly dismissed the action, and the claim should have been brought before the Board. Because this court previously found that the RLA claims were closely connected to the collective bargaining agreement, which the Board had the undisputed authority to interpret, we now recognize the Board's authority to look to the RLA in making its decision. If the Board did rely exclusively on the RLA, it was entitled to do so.

B

An award that is contrary to the clear and unambiguous language of the parties' agreement clearly does not "draw its essence" from the parties' agreement. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L.Ed.2d L.Ed.2d [sic] 286 (1987); *United Food & Commercial Workers Union, Local 1119 v. United Markets, Inc.*, 784 F.2d 1413, 1415-16 (9th Cir. 1986). However, if the award is based on a "plausible interpretation" of the contract, the court may not reverse merely because it believes that interpretation is error. *See W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 764, 103 S. Ct. 2177, 76 L.Ed.2d 298 (1983); *Francesco's B., Inc. v. Hotel and Restaurant Employees and Bartenders Union, Local 28*, 659 F.2d 1383, 1388-89 (9th Cir. 1981). As we have stated, the reviewing

court in order to reverse, must find that the Board's decision is "actually and indisputably without foundation in reason or fact." *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349, 1356 (9th Cir. 1981) (quoting S. Rep. No. 1201, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code & Admin. News 2285, 2287).

The Board was ordered to resolve "*all issues* related to the recall of strikers covered by the Mechanics Union contract with Alaska Airlines following the 1985 strike." E.R., Exhibit 40, at 5 (emphasis in original). The recall was actually governed by two contracts: the new collective bargaining agreement and the back to work agreement, both adopted at the end of the strike. To determine the full recall policy, the Board was required to look to both contracts. *See* E.R., Exhibit 19, at 10.

The back to work agreement provides that strikers will be recalled after Alaska complies with the provisions in the new collective bargaining agreement dealing with vacancies. Article 10 of the collective bargaining agreement states that a vacancy may be filled by a new hire or by an upgrade from a lower classification if "no qualified employees bid." *See* E.R., Exhibit 19, at 10. Alaska contends that the term "qualified employees" does not include strikers; the Union contends that it does.

The Board was thus required to construe both agreements together. Appellee argues that the unambiguous language of the back to work agreement did not require interpretation. However, two contracts were at issue, and the Board, in ruling on the recall issue, was required to construe their interaction.

The district court recognized the ambiguity of the recall policy in its original order, stating that neither the collective bargaining agreement nor the back to work agreement defined "qualified employee." E.R., Exhibit 19, at 10-11. It was the Board's duty to interpret this provision. *See id.* at 12. In doing so, it did not err in looking to the parties' intent and relevant case law to interpret the language of the agreements. It found

that Alaska's interpretation of the collective bargaining agreement, combined with the clear language of ¶ 1.a. of the back to work agreement, "violated the basic agreement between the parties." E.R., Exhibit A at 40. It found that the policy expressed in this interpretation of the agreement demonstrated "union *animus*" and was thus inconsistent with the RLA. It thus ordered the parties to adopt the Union's interpretation of the collective bargaining agreement, under which "qualified employees" included strikers.

Furthermore, the Board did not exceed its authority in going behind the "superficially clear and unambiguous terms" and construing the contract language in light of the intent of the parties. *See Loveless v. Eastern Air Lines, Inc.*, 681 F.2d 1272, 1278 (11th Cir. 1982).

VI

The Board's award was based on the parties' collective bargaining and back to work agreements, and the Board did not exceed its jurisdiction in looking to the RLA, the parties' intent, or case precedent in interpreting the contracts. Given the degree of deference to be accorded the Board's contract interpretation, the award should not have been vacated.

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated District Lodge No. 143, and its affiliated Local Lodge No. 2202, Plaintiffs, v. ALASKA AIRLINES, INC. Defendant.	No. C-85-2140M **ORDER GRANTING ALASKA'S MOTION TO PARTIALLY VACATE SYSTEM BOARD AWARD**

The Plaintiff unions (collectively the IAM) and Defendant Alaska Airlines, Inc. (Alaska) were directed by this Court to submit to the System Board of Adjustment (System Board) their contractual dispute concerning the recall rights of former strikers. This Court stated in its orders that any award by the System Board would be reviewable if either party were dissatisfied with it.

Agreement Paragraph Giving Rise to Award Dispute

Alaska moves to vacate that portion of the Award which invalidates "the clear and unambiguous terms of paragraph 1.a of the parties' Back-to-Work Agreement ("BTWA")."

Paragraph 1.a of the BTWA provides in relevant part:

> Striking Mechanic, Ramp Service and Related employees shall be recalled for service after the provisions within the Agreement for the filling of vacancies have been completed, but prior to the employment of new-hires, in order of classification seniority as openings occur within classifications in which they hold seniority, and shall be restored to work commencing with the most senior as of June 3, 1985. This process shall continue without displacing any employee from the payroll who is employed or who was given an offer of employment as of May 31, 1985.

(Emphasis added.) According to this provision, former strikers awaiting recall have employment rights ahead of new-hires, but do not participate with working employees in the filling of vacancies. The vacancy-filling process within the Collective Bargaining Agreement (CBA) must be completed before former strikers' recall rights under the BTWA become operative as to open positions that arise.

System Board Referral

At the time that this Court denied the Union's motion for a preliminary injunction, it ordered the parties to submit this matter to the five-member System Board of Adjustment. In this Court's November 6, 1986 Order clarifying the scope of the System Board referral, the Court stated:

> So that there is no further dispute about the breadth of the Court's order, the five-man System Board of Adjustment shall, in accordance with its normal procedures, hold a hearing and issue a ruling on the disputes involving *all issues* related to the recall of strikers covered by the Mechanics Union contract with Alaska Airlines following the 1985 strike. The System Board of Adjustment shall consider the mandate of this Court to be broad enough to cover all issues in dispute, including the use of temporary employees, if the Board shall find that such a use violated the agreement between the parties.

(*Id.* at p. 5.)

System Board Award

In its award, the System Board refused to apply paragraph 1.a of the BTWA because it determined that paragraph 1.a violates the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.* Specifically, under the main issue of whether Alaska violated the Collective Bargaining Agreement and/or the Back-to-Work Agreement, the System Board ruled on the two issues relevant to Alaska's motion in this Court as follows:

1. *Permitting junior employees and employees with no classification seniority to fill job openings and transfer between stations while more senior employees are awaiting recall.*

> *** The Board is of the opinion that it has the right to rule upon violations of the RLA. This Board was established under the RLA. However, a decision on this issue does not necessarily have to rely on that basis.
>
> The Board finds that the portion of the BTWA providing that striking mechanic, ramp service and related employees shall be recalled for service after the provisions in the agreement for the filling of vacancies have been completed, but prior to the employment of new hires, was made for the sole purpose of denying seniority rights to senior striking employees. The action itself speaks much louder than the evidence or testimony presented. The sole purpose of such an act resulted in the denial of seniority rights to the striking employees. This action indicates union *animus.* ***
>
> The Board finds that AS violated the basic agreement between the parties and further violated the RLA by such actions.

(System Board Award at pp. 39, 40.)

2. *Permitting new hires with insufficient seniority to bid positions or upgrade to higher classifications in lieu of recalling strikers.*

The Board entered the same conclusion as on issue No. 1.

Having stricken paragraph 1.a as unlawful, the System Board then followed an Eighth Circuit decision and held that striking workers were still employees until they found other work and were "entitled to bid on vacant positions as provided for in the agreement between the parties." (Award at p. 40.) The Board then directed Alaska "to place all striking employees [except strikers who found other jobs and COPS employees] who were eligible to bid on vacant positions into those positions and to pay the loss of earnings which resulted therefrom." (Award at p. 41.)

Issue Presented

The question before this Court is whether the System Board failed to confine itself to interpretation and application of the parties' agreement, and, if so, whether it exceeded the scope of its authority.

Analysis

In reviewing the language of paragraph 1.a of the BTWA, the System Board declared the "sole purpose" of the paragraph and concluded that it demonstrated the subjective ill feelings of one party toward the other.

These declarations by the Board indicate that it did more than merely interpret and apply the terms of the parties' agreement. It was unnecessary for the System Board to concern itself with the purpose of paragraph 1.a because there is no ambiguity in the paragraph, and none was discussed; there being no ambiguity, there was no need to discuss the purpose of the provision in order to shed light on its plain meaning.

Certainly it was inappropriate to draw a conclusion as to the subjective feelings of Alaska toward the Union under these circumstances, as such a conclusion was not needed to shed light on an ambiguous term. The System Board failed to confine itself to interpretation and application of the parties' agreement.

In reaching conclusions about the purpose of paragraph 1.a and the attitude of Alaska toward the Union, the System Board exceeded the scope of its authority. It additionally exceeded its scope of authority when it used these conclusions to deem that paragraph 1.a violates the Railway Labor Act. Finally, the Board exceeded its authority when it analyzed and applied decisional law to determine the meaning of the term "employees," the meaning of which was clear from the context.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1973), the Supreme Court stated:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties:
>
> > "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

> If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced. *Ibid.* Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

The System Board in this case did more than interpret and apply the parties' Back-to-Work Agreement by looking for guidance to other sources. The System Board based its award on what it perceived to be the requirements of enacted legislation — the Railway Labor Act. Moreover, it then applied decisional law to determine the manner in which paragraph 1.a should be applied to "employees."

The System Board impermissibly used external sources to reach its conclusions, and it used these external sources to construe an unambiguous paragraph of the BTWA. In *District 72 & Local Lodge 1127, IAM v. Teter Tool & Die, Inc.*, 630 F. Supp. 732, 735–736 (N.D. Ind. 1986), the Court stated:

> An arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions. [Citations omitted.] Furthermore, the arbitrator cannot ignore, overlook or fail to interpret the agreement's language. [Citations omitted.] When an arbitrator interprets unambiguous language in any way different from its plain meaning, he amends or alters the agreement and acts without authority.

The System Board essentially set aside and rewrote paragraph 1.a of the BTWA rather than merely construe its meaning and application. In doing so it acted without authority. The Ninth Circuit is in accord:

> The arbitrator disregarded a specific contract provision to correct what he perceived as an injustice. Although an arbitrator has great freedom in determining an award, he may not "dispense his own brand of industrial justice." [Citing *United Steelworkers.*] Because the award conflicts directly with the contract, the court properly vacated the award.

Pacific Motor Trucking Co. v. Automotive Machinists Union, 702 F.2d 176, 177 (9th Cir. 1983)

Accordingly, the Motion of Alaska to Partially Vacate The System Board Award is granted and the Award is vacated as to the System Board's decision on Issues No. 1 and 5.

The Clerk of the Court shall send uncertified copies of this Order to counsel of record.

DATED this 9th day of August, 1988.

s/WALTER T. McGOVERN
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated District Lodge No. 143, and its affiliated Local Lodge No. 2202, Plaintiff-Appellant, v. ALASKA AIRLINES, INC. Defendant-Appellee.	No. 88-4079 D.C. No. CV-85-2140-WTM ORDER

Before: BROWNING, BEEZER, and RYMER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing *en banc*.

The full court has been advised of the suggestion for *en banc* rehearing, and no judge of the court has requested a vote on the suggestion for rehearing *en banc*. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing *en banc* is rejected.

APPENDIX D

ALASKA AIRLINES, INC.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

BACK TO WORK AGREEMENT

WHEREAS, Alaska Airlines, Inc. ("Company") and the International Association of Machinists and Aerospace Workers for Mechanics, Ramp Service and Related Crafts, ("IAM") have reached a tentative agreement on a new collective bargaining Agreement ("Agreement") it is in the best interests of the Company and the IAM to enter into a Back To Work Agreement.

THEREFORE, it is hereby agreed,

1. a) Striking Mechanic, Ramp Service and Related employees shall be recalled for service after the provisions within the Agreement for the filling of vacancies have been completed, but prior to the employment of new-hires, in order of classification seniority as openings occur within classifications in which they hold seniority, and shall be restored to work commencing with the most senior as of June 3, 1985. This process shall continue without displacing any employee from the payroll who is employed or who was given an offer of employment as of May 31, 1985. Employees will be returned to work at the station where they were employed on March 3, 1985; if there are insufficient openings at that station the employee may file a preference bid for other stations and shall then be selected for openings at those stations on the basis of classification seniority.

b) It is specifically understood and agreed that the Company has no obligation to return any person to work until there is an opening.

c) The Company will establish procedures for keeping a current list of eligible employees awaiting recall from strike including purging the lists of employees not indicating continuing interest in openings. Notification of openings and offers to return to work shall be confirmed in writing. The Company will use its best efforts to notify persons on the lists of openings as they occur, but may bypass a person who does not respond to such written notification within 7 days of postmark or who does not accept a position when offered. Such persons shall lose seniority in the classification offered. Persons currently on strike and in the employ of the Company within the job classifications covered in the Agreement as of 0700 P.S.T. March 4, 1985, shall retain their seniority until August 31, 1988, even though they have not yet returned to work, so long as they remain on the list of eligible employees maintained by the Company.

d) If the Company determines that a furlough of employees is necesary, subsequent recall of all such furloughed employees will occur before any other person (including those on any lists awaiting recall from strike) is offered a position.

2. The Company and the IAM agree that neither party shall, in any manner, punish or discipline any person for their decision to participate or not to participate in the strike which commenced on March 4, 1985. Except as provided herein, there shall be no fines, harassment, recriminations, sanctions, actions or reprisals against any individual by the Company or the IAM and no lawsuits, reprisals, grievances, harassment or recrimination by either the IAM or any of

its members or by the Company or its subsidiaries or agents against either party to this Back to Work Agreement as a result of any activities during the period 0700, P.S.T., March 4, 1985, to 1000 P.D.T., June 3, 1985. This provision does not extend to prosecution of criminal actions and/or Company discipline against individuals for violence against persons or damage to property, misconduct or other good cause. No employee shall be forced to lose IAM membership, and except as provided above, no person will be forced to lose his employment due to his actions or inactions during the aforementioned period.

3. This Back to Work Agreement is contingent upon ratification of the Agreement between the parties.

4. The Company and the IAM do hereby pledge themselves to prevent any threats, harassment, or damage to property of any person by another person due to either party's working or not working, or other actions during the strike. It is expressly agreed that any such substantiated actions shall be grounds for discipline, including immediate discharge.

5. Any employees not recalled by June 15, 1985 shall return all equipment, clothing, expense advances and any other Company assets by June 30, 1985, or the replacement cost of these assets shall be deducted from any future pay due the individuals.

6. It is acknowledged that the provisions relating to severance allowances of Article XIX of the Agreement do not apply to those awaiting recall from strike.

7. The Company shall give consideration to non-recalled employees over new-hires in filling openings that occur for which they are fully qualified.

Signed this 3rd day of June, 1985 at Seattle, Washington.

WITNESS:

s/Thomas W. Dezutter
s/Robert A. Eldridge

ALASKA AIRLINES, INC.

s/Robert E. Gray
Sr. Vice President/
Industrial Relations

WITNESS:

s/Benedict A. Robbins
s/Thomas M. Gibbs
s/Frank H. Schlais

INTERNATIONAL ASSN.
OF MACHINISTS AND
AEROSPACE WORKERS

s/Charles D. Easley
General Chairman

s/Guy K. Cook
President and
General Chairman

APPENDIX E

SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration between ALASKA AIRLINES, INC. and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,	CASE NO. 27988

APPEARANCES

Lawrence B. Hannah, for the Company
Daniel P. Casey, for the Company
David Campbell, for the Union

ISSUE

Did the Company violate the Collective Bargaining Agreement and/or Back to Work Agreement? If so what is the proper remedy?

The eight broad issues to be considered by the Board under the above references [sic] issue are:

1. Permitting junior employees and employees with no classification seniority to fill job openings and transfer between stations while more senior employees are awaiting recall.

2. Utilizing management personnel, employees from outside the classification and/or bargaining unit and new hires to perform bargaining unit work.

3. Subcontracting bargaining unit work when there are available former strikers to perform that work.

4. Utilizing excessive overtime, and eliminating bargaining unit positions in order to avoid recalling strikers.

5. Permitting new hires with insufficient seniority to bid positions or upgrade to higher classifications in lieu of recalling strikers.

6. Utilizing temporary positions. This practice includes: (1) creating numerous "temporary' positions as a blind to avoid recognition of permanent work availability, (2) denying temporary employees their right to exercise their seniority, (3) arranging the bidding system to preclude temporary employees from bidding jobs, (4) failing to recall employees in seniority order, (5) requiring employees to sign forms waiving their seniority rights, (6) failing to bulletin positions exceeding 90 days, and (7) denying temporary employees of their right to exercise their seniority for layoff and job bidding purposes.

7. Repudiating the contractual bidding system by failing to bulletin jobs or awards.

8. Recalling employees to work out of seniority order.

BACKGROUND

This case involves Alaska Airlines, Inc. and the International Association of Machinists and Aerospace Workers. The Alaska Airlines Mechanics and Related Bargaing [sic] Unit (MRP) commenced a strike on March 4, 1985. The strike ended on June 3, 1985. At the outset of the strike, some members of the Carrier's Clerical Office and Passenger Service employees (COPS) and the Flight Attendants honored the strikers' picket lines. The Carrier continued to operate with both non-strikers

and purported "permanent replacements" hired during the strike. Some mechanical work was subcontracted out during this period of time. Shortly thereafter the Carrer unilaterally implemented a contract containing substantially all of its original contract demands. Thereafter, negotiations proceeded principally on the terms of a back-to-work agreement. The Carrier took the position that no back-to-work agreement would be entered into covering COPS employees who had honored picket lines, and no replacements of non-strikers would be subject to displacement at the end of the strike. The Union rejected the back-to-work agreement as first proposed by the Carrier but finally accepted the terms of the implemented contract.

The issues involved herein arose pursuant to the strike. The Carrier announced that it would accord all "working employees" an automatic preferential right to fill all post-strike job openings. On that basis non-strikers were given super seniority over senior ex-strikers to upgrade or move between stations. There was also some 10,000 hours of maintenance work subcontracted.

During the early months of 1986 the Carrier began recalling mechanics to work. In the spring of that year the Carrier also commenced recalling significant number [sic] of ramp service and fleet service employees to work. They were not recalled to their former positions but were offered "temporary positions." These individuals were asked to sign forms acknowledging the Carrier's position that at the end of their "temporary positions," they would return to what the Carrier has defined as "replaced status," a status in which seniority rights ordinarily accorded to laid off employees do not apply. They were also advised that they would not be permitted to exercise their seniority for purposes of bidding on shift realignments or to displace junior "working" employees.

In the fall of 1985 the Union filed suit against the Carrier in the Federal District Court for the Western District

of Washington seeking a *status quo* injunction barring the Carrier's super-seniority plan pending resolution by this Board. Judge McGovern, in two orders, held that the Union's claim was sufficient on their merits to warrant injunctive relief but the Union had failed to show irreparable harm, *i.e.*, harm which could not be compensated by monetary damages. The Court held that the Board possessed jurisdiction to award full compensatory damages. The Court also directed that all recall issues be presented to this Board.

Pursuant to that mandate this Board was convened on November 17, 1986. Prior to the hearing of the evidence, the Board ruled that all remedy issues would be bifurcated. The Board ruled that it would hear broad recall issues, rather than individualized cases. After the ruling by the Board on the broad issues involved, the parties may have an opportunity to attempt to resolve the individual disputes, but if they are not able to do so, they will be resolved by this Board. The Board would retain jurisdiction to resolve the individual cases. The Board does not reserve jurisdiction on any case which did not come within the purview of the broad issues to be ruled upon.

The hearing commenced in Seattle, Washington on November 17, 18 and 19, 1986. The hearing was continued and held in March of 1987 on March 9, 10, 12, 13, 16, 17, 18 and 19, 1987 and again continued on June 8, 9 and 10, 1987. The International Association of Machinists and Aerospace Workers was represented by David Campbell of Hafer, Price, Rinehart and Schwerin. The Carrier, Alaska Airlines, Inc. was represented by Lawrence B. Hannah of Perkins Coie and by Alaska Airlines Corporate Counsel, Daniel P. Casey.

Pursuant to the hearings the parties have filed briefs and reply briefs. The transcript of the hearings contain over 1700 pages of testimony, as well as over 200 exhibits. Some of the exhibits are voluminous. The matter is now before the System

Board of Adjustment for a decision on the issues involved. This five-man Board consists of William MacKay and Gail L. Neufeld for Alaska Airlines, Inc. and Carolyn Moe and Suzie Welch for the Union, and the undersigned was selected by the parties as Chairman of the System Board of Adjustment.

POSITION OF THE UNION

The Union has presented eight classes or broad issues involved in this case. Those are as follows:

1. Permitting junior employees and employees with no classification seniority to fill job openings and transfer between stations while more senior employees are awaiting recall.

2. Utilizing management personnel, employees from outside the classification and/or bargaining unit and new hires to perform bargaining unit work.

3. Subcontracting bargaining unit work when there are available former strikers to perform that work.

4. Utilizing excessive overtime, and eliminating bargaining unit positions in order to avoid recalling strikers.

5. Permitting new hires with insufficient seniority to bid positions or upgrade to higher classifications in lieu of recalling strikers.

6. Utilizing temporary positions. This practice includes: (1) creating numerous "temporary' positions as a blind to avoiding recognition of permanent work availability, (2) denying temporary employees their right to exercise their seniority, (3) arranging the bidding system to preclude temporary employees from bidding jobs, (4) failing to recall employees in seniority order, (5) requiring employees to sign forms waiving their seniority rights, (6) failing to bulletin positions exceeding

90 days, and (7) denying temporary employees of their right to exercise their seniority for layoff and job bidding purposes.

7. Repudiating the contractual bidding system by failing to bulletin jobs or awards.

8. Recalling employees to work out of seniority order.

The Union also contends there is a special issue of whether Alaska Airlines' pattern and practice of creating barrier to striker recall violates the contractual provisions barring anti-Union discrimination. The Union points up that arbitrators have consistently held that Employers who exercised otherwise valid contractual prerogatives with the intent or effect of discriminating against those who engage in Union activity violate such provisions.

The Union points up that the parties herein are covered by the Railway Labor Act, and this Act prohibits employer "interference, influence or coercion" over the designation of Union representation. The Union urges that it also bars employers from interfering "in any way with the organization of its employees" and the "influence and coercion of any employees in an effort to induce them to join or remain or not join or remain members of any labor organization" 45 U.S.C. Sec. 152 Fourth. The Union points up that the statute expressly provides that these paragraphs are "hereby made a part of the contract of employment between the Carrier and each employee and shall be held binding over the parties regardless of any other express or implied agreements between them" 45 U.S.C. Sec. 152 Eighth. On the foregoing basis the Union contends that the Railway Labor Act's statutory provisions must be considered as an integral part of any contractual construction.

The Union cites *RLEA v Boston and Maine*, 808 F.2d 150, 156-158 (1st Circ. 1986) wherein the Court found that employer

actions otherwise within its legitimate contractual prerogatives were violative of the agreement where motivated by anti-union discrimination. The Union alleges that Judge McGovern, in reviewing the precise facts of this case analyzed the case based on whether the Carrier's conduct was in compliance with the statute. The Union points to Judge McGovern's quote:

> "It is difficult to predict if the Union will prevail on the merits of its claim before the System Board of Adjustment. While the Union may not have adequately demonstrated probably [sic] success on the merits, it has at least shown sufficiently serious questions going to the merits to make those questions a fair ground for litigation. The reemployment scheme initiated by the airline is somewhat similar to a super seniority plan held illegal in *ALPA v. United Airlines, supra*, 614 F. Supp. 1020. In that base [sic], the court found that an airline's post-strike "rebidding" of job vacancies, involving granting of permanent "super seniority" to non-striking pilots, was unlawful under the Railway Labor Act. While it is true that the carrier has the duty to make all reasonable efforts to continue its operations during the strike, its power to make new terms and conditions governing the new labor force it hires is strictly confined within the RLA. The Act imposes upon the carrier the "twin obligations" to serve the public by reasonably attempting to operate during the strike and by reasonably attempting to maintain the employer-employee relationship. *Empress Ecuatoriana De Aviacion, S.A. v District Lodge*, 690 F.2d 838 (11th Cir. 1982). The granting of post-strike promotional preferences to replacement workers may not have been "needed" for the continued operation of Alaska during the strike."

Also in this context the Union points to Joint Exhibit No. 1 on Page 82 where it is stated:

> "N. Nothing herein shall be construed to limit, restrict or abridge the rights or privileges accorded either to the

> employees or to the Company, or to their duly accredited representatives, under the provision of the Railway Labor Act, as amended."

The Union also notes that the Agreement between the parties contains a savings clause which reads as follows:

> "Should any part or provisions of this Agreement be rendered invalid by reason of any existing or subsequently enacted legislation, such invalidation of any part or provision of this Agreement shall not invalidate the remaining portions thereof and they shall remain in full force and effect."

The Union then cites awards which hold that agreements which contain savings clauses permit external public law to be absorbed into the labor agreement and permit the arbitrator to issue awards which are compatible with the external law.

The Union alleges that striking constitutes a protected Union activity within the meaning of contractual anti-Union discrimination clauses. The Union urges that the courts have consistently held that discrimination against strikers violates the Railway Labor Act prohibitions on anti-union discrimination. It is pointed out that where an [sic] employer practices result in discrimination against strikers, a contractual discrimination claim is established regardless of the underlying, substantive contractual provisions. The Union cites *ALPA v United Airlines*, 802 F.2d 886, 900 (7th Cir. 1986); the issue therein was whether United violated Sections 152 Third and Fourth of the Railway Labor Act by "rebidding" all pilot positions during an ALPA strike; the rebid procedure permitted non-strikers to "leap frog over more senior striking pilots" for positions to be filled after the strike; focusing on both a lack of business necessity and apparent anti-union motivation, the Court held that the rebid violated Section 152, Fourth; the Court notes that the rebidded positions were not to be filled until after the strike, thereby rebutting any claim that the

rebid was necessary to continue oeprations during the strike; United's claim that honoring the rebid "in order to keep its word to those pilots who crossed the picket lines" was deemed insufficient justification. The Union contends that the Court concluded that regardless of business justification, the rebid was, in fact, motivated by anti-union *animus*, thereby automatically rendering it unlawful.

The Union also cited *Randall v NLRB*, 687 F2d, 1240, 1243-44 (8th Cir. 1982), *cert. den.* 461 U.S. 914 (1983) wherein the Circuit considered a recall scheme similar to that presented herein; the employer permanently replaced strikers; after the strike vacancies arose in certain special rated, high-paying positions which would, prior to the strike, have been awarded to the employee with the highest qualifications and seniority, 687 F2d at 1241; the employer granted all such positions to currently working cross-overs and replacements rather than strikers awaiting recall with superior qualifications and seniority; hold that the employer's recall plan granted unlawful super-seniority, the Court stated (687 F2d at 1244): "The practical effect of Randall's procedure . . . was to make it less likely that strikers would be reinstated to the higher-paying positions. Randall's procedure was discriminatory in the same sense as the grant of super-seniority to Erie Register; Randall gave an additional preference besides permanence to those who remained at work as opposed to those who struck, despite the fact that the latter were still 'employees' for legal purposes."

The Union also cites *Bethlehem Steel*, 10 LA 186 wherein Arbitrator Simkin held that a strike settlement provision barring discrimination based on "participation" in a strike to be "an agreement to let bygones be bygones and just as far as humanly possible wipe out the whole strike incident as something which had best be forgotten." Based on that interpretation he held that awarding non-strikers higher-paid "leader" positions rather than recalling strikers for such positions violated both the strike settlement and general contract nondiscrimination clauses.

The Union contends that arbitrators have consistently protected strikers from discrimination by the precise type of non-discrimination clauses at issue herein. The Union further urges that arbitral authority holds that an Employer's exercise of an otherwise lawful contract prerogative is rendered unlawful if it has an unlawful purpose. The Union points up that unlawful and improper motivation is most often established through actions rather than words. The Union cites the *NLRB v Fleetwood Trailer Company*, 389 U.S. 375 wherein it was held: "Proof of anti-union motivation is unnecessary when the employer's conduct 'could have adversely affected employee rights to some extent' and when the employer does not meet his burden of establishing 'that he was motivated by legitimate objectives.' "

The Union then cites *NLRB v Erie Resistor*, 373 U.S. 221 wherein the Supreme Court held that "the employer must be held to intend the very consequences which foreseeably and inescapably flow from his actions." The Court held that absent direct evidence as to motivation, granting super-seniority to non-strikers carried its own indicia of unlawful motivation.

The Union alleges that the Company's post strike actions reflect a conscious effort to creat [sic] discriminatory barriers to recall. The Union points to the fact that the parties' Agreement provides: "No employee covered by this Agreement will be interfered with, restrained, forced or discriminated against by the Company, its officers or agents because of membership in or lawful activity on behalf of the Union." Also in this connection the Union points to the Back to Work Agreement wherein the parties agreed: "The Company and the IAM agree that neither party shall, in any manner, punish or discipline any person for their decision to participate or not to participate in the strike which commenced on March 4, 1985. Except as provided herein, there shall be no fines, harassment, recriminations, sanctions, actions or reprisals against any individual by the Company or the IAM and no lawsuits, reprisals, grievances, harassment or recrimination by either the IAM or any of its

members or by the Company. . ." The Union has alleged that this Agreement was intended to put strike-related *animus* behind.

The Union alleges that the Carrier insisted on granting non-strikers super-seniority for post-strike job openings and thus established a discriminatory intent. The Union alleges that at the conclusion of the strike, there were approximately 400 to 450 employees participating. The Union contends the Carrier has filled all positions, other than some in the mechanics classification, with new hire "replacements" or employees who crossed the picket line. The Union points up that all parties agreed that strikers would not immediately return to work by displacing cross-overs or replacements. The Union alleges that the Carrier went one step further, and instead of filling post-strike job openings by recall, the Carrier decided to fill all such openings with "currently working employees," *i.e.*, non-strikers. The Union alleges this included both promotional vacancies and transfers. The Union contends that this practice of awarding all post-strike vacancies to "working employees" on a preferential basis is functionally equivalent to the rebid at issue referred to *supra*. The Union alleges that the effect of the Carrier's policy was foreseeable and inevitable and resulted in "currently working" non-strikers being given automatic preference and awarded both higher rated, higher paying positions and choice of station. The Union alleges that as a result thereof, no strikers were directly recalled to available lead positions. Also the Union contends that when the "currently working employees" were given special preference, the strikers who possessed seniority in lower classifications were able to accept positions in those classifications and leap frog over senior strikers to higher classification jobs. The Union alleges that the foregoing action resulted in artifically [sic] dividing the work force into working and non-working groups and thus rendered recalls in seniority order impossible. The Union also alleges that the Carrier's action in awarding the positions

to replacements was expressly in violation of a contractual provision it negotiated barring bids within the probationary period plus six months. The Union alleges that many new employees were given lead positions while strikers with twenty to thirty years of experience and seniority were disregarded.

The Union alleges that the second practice initiated at the end of the strike was the Carrier farming out a substantial portion of its maintenance work to various contractors. The Union alleges that prior to the strike Alaska's plan was to increase the number of airline mechanics. The Union alleges that during the period from June through November of 1985 thousands of hours of mechanics' work were farmed out; all of such work was of the type which had been done in-house for many years prior to the strike. The Union contends that the Carrier conceded that most of that work had never been farmed out before. The Union contends that with minor exceptions the Carrier did not claim that it lacked the facilities or equipment to perform the large majority of that work. The Union alleges that an adequate and sufficient number of mechanics were available for recall to have performed practically all of the work which had been farmed out.

The Union takes the position that the next practice initiated by the Carrier involved the elimination of bargaining unit positions in favor of the use of increased overtime. The Union points up that the Carrier increased its flight schedule during the year of the strike and points up that revenue passenger miles increased in excess of twenty-five percent in 1985 over 1984. The Union further points up that the Carrier also began a new, all cargo overnight freight service between Seattle and Anchorage. The Union also points up that further increases were posted in 1986 for a total twenty-three percent increase in passenger revenue miles for the first nine months of 1986 over 1985.

The Union alleges that new duties were assigned to ramp employees which increased work volume. The Union alleges

that the total bargaining unit work rose six percent in 1985 and fifteen percent in 1986. The Union alleges that from the end of the strike to the date of the arbitration hearing, substantial increases in overtime over historical levels occurred. The Union contends that the increase amounted to some 27,983 hours for the period January through November of 1986.

The Union points up that at the commencement of the summer schedule in June of 1985 twelve ramp or lead ramp employees were terminated or permanently left their jobs, and only three strikers were recalled to permanent ramp jobs in June of 1985. The Union alleges that in July and August of 1985 another fifteen ramp or lead ramp service employees left the service of the Carrier and only five ramp strikers were recalled. The Union then alleges that by May of 1986 some forty-nine working non-striking ramp or lead employees permanently left their positions, but only twenty-seven ramp employees had been called back to permanent jobs. In short, it is alleged by the Union that despite an increased work load, some twenty-two ramp jobs evaporated. The Union alleges that similar conditions existed in the stockroom clerk classification.

The Union alleges that in addition to overtime supervisors performed a substantial amount of work at several stations. It is alleged that it was routine for supervisors to perform maintenance work at Kotzebue, Nome, Cordova and Sitka. The Union then alleges that at Juneau, Kotzebue and Nome managers admitted performing one to several hours of ramp service per week during the summer of 1986. The Union alleges that in November and December of 1985 Management or secretarial employees performed ramp work for two to three hours per day for periods between three and six days. The Union alleges that in December of 1985 Carrier officials requested adding fifteen new employees to the ramp classification, and such was approved by the corporate office, but still the positions were never filled. The Union alleges that the Regional Vice President determined to cover the work with overtime.

The Union recognizes that the Carrier takes the position that a hiring freeze indicates a non-discriminatory purpose for the above actions. The Union alleges that the freeze only applied to new hires and not replacing hiring. The Union urges that the use of time and one-half and double time instead of using experienced former strikers at straight time is economical nonsense. Further it is urged that it is unreasonable to use management or supervisors from busy stations rather than using the readily available pool of experienced strikers. The Union further points to the fact that thirty-five new COPS employees were hired while the alleged freeze was in effect; some eleven new pilots and twenty-one new flight attendants were added to the seniority rosters. The Union urges there is no evidence that the elimination of ramp, fleet or stock positions would be economically feasible. The Union alleges that the foregoing action was harmful to only one group of employees, *i.e.*, the long unemployed strikers.

The Union next contends that the Carrier hired new post-strike employees to perform unit work. The Union contends that the Carrier hired four ramp personnel for positions to which the strikers were awaiting recall. The Union cites the employment of Elmer Goodwin at Kotzebue for a month-long position; next an indefinite ramp position to Mr. Goodwin from October 12, 1985. The Union alleges that Mr. Goodwin worked between thirty to forty hours per week thereafter. The Union recognizes that the Carrier contends that a striker first refused that work, but the Union alleges that the striker awaiting recall who refused the work was offered significantly different terms, including hours, which was the basis for his rejecting that offer. The Union recognizes that the Carrier contends Mr. Goodwin was only employed for a short time and then terminated, but the Union alleges that Mr. Goodwin had been rehired for a period of indefinite length.

The Union alleges that the following summer two new ramp service employees were hired at Kotzebue for between

two weeks and a month. The Union alleges that they were employed before contacting two former strikers who arrived within four to five days for temporary positions. The Union contends that the two former strikers were terminated while Mr. Goodwin, the post-strike new hire, was retained. The Union alleges that David Cohen was employed at Cordova and was a new employee, and at the same time preference bids were on file from strikers.

The Union alleges that a group of new hires were a new classification designated as "cleaners." The Union contends the work performed by the cleaners was performed prior to the strike by three ramp employees. The Union alleges that pursuant to the strike, the Carrier hired some seventeen "cleaners" for Seattle and Anchorage. The Union alleges that between February and March and May through September the Carrier required "cleaners" to perform ramp work on a regular nightly basis.

The Union next contends that the use of temporary positions by the Carrier was designed to bar recall to permanent positions and to punish strikers. The Union alleges that this practice principally affected stockroom, ramp and fleet service ex-strikers. The Union alleges that the policy established by the Carrier is undisputed and was established as follows:

1. Offer "temporary" rather than "permanent" positions to strikers.

2. Make recall offers for "temporary positions" via phone contact rather than through a written offer.

3. Require employees to sign forms providing that "at the conclusion of your temporary assignement [sic] you will revert to your former status, *i.e.*, "Replaced."

4. End the employment of "temporary" strikers and retain junior permanent and temporary employees instead.

5. Prohibit temporary employees from bidding on shift realignments or bids.

6. Permit "temporary" former strikers to bid "permanent" positions and thereby obtain recall ahead of senior former strikers, and

7. Unilaterally establish such positions regardless of whether temporary positions within a classification and/or station actually overlap or run consecutively for over the contractual 90 day time limit.

The Union alleges that the practice of contacting the employees by phone rather than by letter is predictable and certainly made by-passing quite a possibility. The Union alleges that the practice by the Seattle ramp supervisor was to go down the list and take whoever he found at home. The Union alleges that Carrier would not contact a striker for a second temporary position if he turned down the first offer.

The Union alleges that the strikers were required to sign two forms after reporting for work, the first specified the length of the temporary position, and the second was an acknowledgement that he was in a temporary position and that he would have full preference bidding rights toward any permanent opening that might exist, and at the conclusion of his temporary assignment, he would revert to his former status, *i.e.*, "replaced." The Union alleges that this procedure provided an individual contract with the striker and the Employer, and such individual dealing was designed to subvert the Union's role as the exclusive bargaining agent. The Union urges that such individual dealing violated the non-discrimination clause.

The Union alleges that the Carrier has denied strikers serving in temporary jobs the right to exercise their seniority *vis-a-vis* any other employees; hence, when a reduction in force occurs, senior striker temporaries will be terminated in lieu

of junior "permanent" employees who are composed almost entirely of non-strikers. The Union alleges that the practice prior to the strike had been for temporary employees to bid on shift schedules. The Union alleges that temporary strikers were not permitted to participate in any fashion on shift realignments, either as to choice of shift or choice of permanent part-time or full-time positions.

The Union alleges that immediately after the strike non-strikers employed in the summer of 1985 were accorded permanent positions, while former strikers employed a year later for the same positions were forced to accept temporary positions. The Union contends that in the summer of 1986 the number of temporary positions increased almost five fold, and those positions were reserved for strikers. The Union points up that a few were awarded to non-strikers but those involved temporary upgrades. The Union alleges that many of the temporary positions ended up being in excess of ninety days, and the Carrier was either forced to recall strikers to permanent summer positions or to employ tactics which would not permit strikers to work in excess of eighty-nine consecutive days in any position.

The Union urges that in April and May of 1986 the Carrier called back eight ramp strikers for varying periods of successive temporary positions, and they were then returned to "replaced" status, and some eleven striking employees were then brought in for varying temporary positions from the beginning of May through the end of May with breaks of only a few days. The Union contends that the Carrier then brought in its summer complement between June 9 and June 19 rathern [sic] than on June 1. The Union alleges the Anchorage complement was also largely brought in late, rather than in early June. The Union contends that during this same period many non-strikers were awarded temporary upgrades, either full-time or lead positions in Seattle. The Union alleges that this action assured that the highest paid positions would be awarded to non-strikers.

The Union also contends that during the summer, the Carrier also created consecutive or nearly consecutive temporary positions. The Union points up that the Carrier staggered overlapping temporary jobs. The Union points up that at the end of the summer all Seattle ramp temporary positions were terminated prior to the end of the summer schedule. The Union alleges that to cover the work the Carrier posted a notice allowing employees to sign up for some twelve shifts of overtime, and the Carrier also called back ten ramp and one fleet service strikers to additional temporary positions less than a week after many of the same strikers had had their temporary positions terminated. The Union points up that at least two strikers were recalled to consecutive temporary positions from the end of the summer schedule until the date of the arbitration hearing.

The Union points up that Steven Johnston, a ramp striker, worked in Seattle ramp consecutive temporary positions from June through the date of the arbitration hearing with only a two week break. The Union also points up that Tom Bogie, a ramp striker, worked consecutive temporary positions in Seattle from September, 1986 until the date of the arbitration hearing. The Union alleges that the Carrier admitted that not one single ramp striker was recalled directly to a permanent job in Seattle from the end of the strike through the summer of 1986.

The Union points up that the Carrier maintained that failure to accept temporary positions waived recall rights but alleges that in many cases the most senior strikers were still awaiting recall while junior strikers leap frogged ahead via temporary positions to permanent jobs. The Union alleges that this practice, combined with the granting of superseniority to "working employees" created an anomalous, confusing situation in which recall in seniority order became an impossibility.

The Union alleges that the Carrier failed to provide written offers of temporary employment and required strikers to sign what amounted to individual contracts for such positions and denied temporary strikers the right to exercise their seniority in a fashion consistent with permanent "non-strikers" and created temporary positions as a blind to what actually constituted permanent work via staggered and consecutive temporary positions and other practices.

The Union alleges that the Carrier's own admissions in regard to striker recall confirm the existence of discriminatory intent. The Union alleges that two witnesses heard Rod McNett, Alaska's Group Operations Supervisor for Seattle, state that managers were told not to bring back strikers, *i.e.*, "You know we were told not to call any of you back back [sic] under any circumstances; under no circumstances did they want any A scale people back on Company premises." The Union recognizes that Mr. McNett denies making such a statement but alleges that Mr. McNett's own admission indicates that extensive parts of his remaining testimony was false. The Union also alleges that another Seattle supervisor, Mr. McCarty, told one employee: "As far as he's concerned, he hopes that they (strikers) never come back." The Union has cited other statements by supervisors along similar lines.

The Union points up that other indicators of Alaska's anti-union *animus* include: (1) post strike memo to the Carrier's officers outlining the specific means of resigning union membership so as to advise union employees; (2) Alaska's attorney-client privilege objections to documents reflecting legal bills and communications to or from the Williams, Kastner & Gibbs Law Firm. The Union points up that this firm has represented two dissident in-house labor organizations seeking to oust IAM representation of Alaska employees, and some 185 employees sued the union based on events arising out of the strike. The Union alleges that the Carrier's failure to call the supervisors referred to above as witnesses creates a strong implication that the Alaska policy, as alleged by the Union, was true.

The Union agreed that as a result of the back-to-work agreement, strikers possessed no rights arising at the termination of the strike to immediately bump non-strikers. The Union raises the issue that the Carrier should not be permitted to grant a benefit above and beyond permanence to non-strikers, *i.e.*, the preferential right to secure all post-strike job openings ahead of other strikers awaiting recall. The Union notes that the Carrier relies upon the language contained therein which states: "After the provisions within the Agreement for the filling of vacancies has been completed." The Union contends that the Carrier's interpretation of that language is inconsistent with the parties' Agreement as a whole, the negotiation history, as well as controlling law and policy and the back-to-work agreement which establishes that striking employees, along with all others, possess the right to participate in the contractual job bidding process. The Union points to the Agreement on Pages 36 and 37 wherein it is stated: (B) Classification seniority system-wide shall be recognized at all points where persons hereunder are employed, in all reductions of force and recall after layoff, in bidding for vacancies or new jobs, for preference of shift assignment when a vacancy occurs, and in all promotions, layoff or transfers involving classifications covered by this Agreement."

The Union stresses that upgrades of employees with no classification seniority can only occur if "no qualified employee bid. . ." The Union alleges that the back-to-work agreement defines strikers as employees in at least six places. The Union stresses that the key purpose of the back-to-work agreement was to insure return to work in classification seniority order. The Union urges that the construction by the Carrier would defeat that very purpose. The Union urges that the Carrier's action places a premium on seniority in the lowest classifications while insuring that no lead positions will be available to a senior striker. The Union urges that the Carrier's construction is inconsistent with federal law and policy.

POSITION OF THE COMPANY

Alaska points out that the Federal Court in Seattle issued orders on August 25, 1986 and November 6, 1986 in the *International Association of Machinists and Aerospace Workers, AFL-CIO v Alaska Airlines, Inc., No. C85-2140M,* denying the plaintiff's motion for a preliminary injunction and finding the dispute to be minor in nature and one which the contractual System Board of Adjustment should hear.

The Company points up that this System Board was established, and at the opening of the hearings on November 17, 1986, the chairman ruled that the System Board would resolve the broad issues involved in the recall of ex-strikers and would not "hear individual cases" and would then, after ruling, retain jurisdiction over any disputes the parties could not resolve.

The Employer then points up that a particularization of Union issues was requested, and the IAM Council response of February 25, 1987 alleges eight practices aimed at precluding former strikers from returning to work. The Employer then points up that a number of past issues, actually or potentially advanced by the Union, were withdrawn and rejected as issued by Chairman Moore. Those issues were:

1. Severance pay is not in issue.
2. Reassignment from part-time to full-time status is not in issue.
3. Claims related to the Sargeant arbitration, and any other individual cases, are not in issue.
4. Discipline claims are not in issue.
5. The phrase "and awarding jobs out of seniority order" is deleted from issue number 7 in the February 25, 1987 letter of IAM counsel.

6. The phrase "or during the period between May 31, 1985 and June 3, 1985" is deleted from issue number 8 in the February 25, 1987 letter of IAM counsel.

The Company further notes that in advance of the hearing, the IAM requested bifurcation of damages, and the Chairman so ruled by Order of October 29, 1986.

The Company alleges there are three sets of reservations or objections to the issues for decision as presently formulated by the System Board. The Employer alleges that too broad a gloss has been applied to the federal court orders. The Company contends that this System Board should only hear those issues fairly represented by the Gibbs grievance, thereby allowing the contractual grievance procedures to work in the normal fashion so that other System Boards hear the issues presented in other pending grievances as those grievances mature.

Secondly, the Employer objects to the addition of subcontracting to the Gibbs grievance. It is pointed ou [sic] that just weeks before the opening of the Gibbs hearing in November of 1986, subcontracting was, by the IAM's own admission, not a part of the Gibbs case except as "additional background evidence." On that basis the Carrier contends this issue should be excluded from the Gibbs case.

The Employer also alleges that many of the IAM's putative claims are not arbitrable because they do not arise from or relate to the back-to-work agreement (BTWA). The Employer then alleges that some of those putative claims have no nexus whatsoever to the BTWA or even the collective bargaining agreement (CBA). The Company alleges that lacking such a nexus, the claims are substantially non-arbitrable. The Employer alleges that the claims by IAM would require Alaska Airlines to make work for former strikers by creating more permanent and temporary bargaining unit positions, reducing employee overtime, reducing or eliminating cross-utilization

of bargaining unit personnel, eliminating instances of supervisors performing bargaining unit work, and the earlier elimination of maintenance subcontracting.

The Company contends that the IAM should not be permitted to litigate beyond the terms of the controlling contractual agreement, namely, BWTA. Further, Management alleges that the IAM should be permitted to litigate only those claims fairly arising under "Gibbs, *et al*" which involve the application of the terms of the BTWA to the recall of strikers for recognized positions.

Alaska Airlines submits that its post-strike conduct squares with the contours and guidance set by the terms of the BTWA. The Company alleges that two provisions of the BTWA are critical; first, recall rights for ex-strikers vest "after the provisions within the Agreement for the filling of vacancies have been completed, but prior to the employment of new hires." The Company takes the position that the BTWA provides former strikers awaiting recall have rights ahead of new hires but do not participate with working employees in the filling of vacancies. The Employer alleges that the vacancy-filling process must be exhausted before ex-striker recall rights become operative. The Employer alleges that the IAM would delete "after" from Paragraph 1.a and substitute in its place "as part of" the vacancy-filling provisions. The Company alleges that such would nullify the contractual rights of working employees (represented by the IAM) to compete for the vacancies ahead of ex-strikers awaiting recall.

Secondly, the Company alleges that Paragraph 1.b of the BTWA expressly provides that ex-strikers' recall rights to [sic] not become operative "until there is an opening." On that basis Alaska contends the Company determines when an opening occurs. Management alleges that the work force system was not altered after the strike in order to deprive ex-strikers of recall. The Company alleges that a few factual and contractual

differences were obtained after the strike, such as, a ninety day temporary position as opposed to a thirty day temporary position; the right to cross-utilize bargaining unit personnel between and among job classifications; a greatly expanded right to use part-time personnel; and a vastly expanded right to subcontract.

The Company contends that even if it had permitted ex-strikers awaiting recall to compete on an equal basis with working employees, the total number of employees working would be the same, and the number of ex-strikers who were recalled would be the same, and as a rule, only the work location to which individual employees were assigned would be affected.

Alaska Airlines alleges that there is no evidence to suggest the grand conspiracy theme which has been alleged by the IAM.

Alaska Airlines points up that in November of 1986 the Court characterized the "Gibbs, *et all* [sic]" dispute as "a minor dispute over contract interpretation," and the Order declared the Court's agreement with the IAM that the "Gibbs grievance was broadly worded to encompass the purported continuing violations of the back-to-work provisions dealing with the recall of former strikers, including the use of temporary positions." The Company points out that according to the Court, the System Board would rule on "all issues related to the recall of strikers . . . including the use of temporary employees, if the Board shall find that such a use violated the agreement between the parties."

The Company alleges there is no hint that any alleged Railway Labor Act violations are part of the issues for the Board to determine. The Employer takes the position that the jurisdiction of System Boards is limited to the interpretation of the collective bargaining agreements. It is urged that a

claim involving statutory obligations imposed by the Railway Labor Act would be under the jurisdiction of federal courts, but when a claim involves the interpretation of a collective bargaining agreement, the dispute is properly before a System Board.

Alaska Airlines makes the following contentions regarding the BTWA:

1. The BTWA is the one and only contractual agreement between the IAM and AS conferring recall rights on former strikers. The CBA does not purport to confer recall rights on former strikers.

2. Under ¶ 1.a of the BTWA, former strikers with classification seniority have the right to be recalled prior to the employment of new hires, but after — and not as part of — implementation of the CBA's vacancy-filling provisions.

3. The recall rights of ex-strikers do not become operative until after the vacancy-filling provisions "have been completed;" as a corollary, working employees are entitled — as a contractual right — to compete for vacancies before ex-strikers have the right to recall.

4. The recall of ex-strikers is to be accomplished without "displacing" working employees.

5. Under § 1.b of the BTWA, AS has no duty to recall an ex-striker unless and until there is an "opening" which AS has determined to create or maintain. Further, it is for AS to determine whether a position is temporary or permanent.

6. Furloughed employees and ex-strikers awaiting recall are expressly identified as separate and distinct categories. Paragraph 1.d of the BTWA clearly makes this distinction, contrasting the furloughees' preferential rights to the subordinate rights of ex-strikers awaiting recall.

7. In bargaining, the IAM tried unsuccessfully to negotiate better recall rights for strikers than AS would accept.

Alaska Airlines recognizes that the IAM contends that the BTWA is (a) contrary to the RLA, and (b) sufficiently ambiguous that an RLA-dictated construction should be adopted rather than Alaska's construction. The Company alleges that the BTWA, as interpreted by Alaska Airlines, is (a) not inconsistent with the RLA, (b) the BTWA is clear and unambiguous, (c) in any event the duty of this System Board is to apply the BTWA as written and not to sit as a federal court interpreting and applying the RLA. The Company recognizes that the IAM asserts that Alaska's actions in recalling employees under the BTWA violated various provisions of the RLA, namely Section 2, 3rd and 4th of the RLA. Alaska points up, however, that Section 2, 3rd and 4th, bestows rights only in the period before certification of a union. On that basis the Company alleges that the statutory provisions necessarily are inapplicable to post-certification disputes such as "Gibbs *et al.*"

Furthermore Alaska contends that the IAM has failed to establish any violation of Section 2, 3rd and 4th, as well as any other RLA provision. The Company points to the cases relied upon by the IAM under Section 2, 1st, addressing the permissible bounds of carrier self-help during a strike. Alaska points up that in *Boston and Maine* and *United* the challenged employer actions occurred during the strike, without an agreement with the unions, in order to induce strikers to abandon their strike. Alaska points up that in *Boston and Maine* the employer unilaterally abolished strikers' jobs in retaliation for the employees having gone on strike. The Company then points up that in *United* the employer unilaterally rebid the airline during the strike "out of spite for ALPA," and the court found that the "rebid was part of a plan to break the strike, and according to United's chairman, was meant to cause "penalty and harm and hurt" which "the union will never negotiate away."

Alaska further notes that United's unilateral plan perpetuated its naked discrimination by awarding all vacancies after the strike to non-strikers and precluded reinstated strikers from bidding for future vacancies. The Company points up that during this strike the carrier did not select any such self-help measures during the strike nor impose those measures on the IAM. Alaska notes that the recall system complained of herein was implemented after the strike on the basis of the BTWA and with the express consent of the IAM.

Alaska recognizes that the IAM has invoked the National Labor Relations Act and points up that such an expansion would contravene the express admonition of the Supreme Court to construe the RLA with the utmost care and with full awareness of the differences between the RLA and the NLRA. It is pointed up that the RLA, by its express language, is limited to the protection of organizing and representational rights (45 U.S.C. § 152, 3rd and 4th). The Carrier points up it does not contain the broad "concerted activity" rights of Section 7 of the NLRA. Thus, Alaska contends that a negotiated back-to-work agreement supplants the RLA concerning recall rights of strikers.

Alaska recognizes that the IAM has alleged a conspiracy by the Carrier to discriminate against striking employees. In this connection Alaska alleges there is no evidence except for equivocal, innocent, and/or after-the-fact remarks attributed to several first-line supervisors. In this context Alaska alleges that Mr. McNett denied making the remarks allegedly made by him on December 18, 1986, and the witness for the Union made conflicting statements as to what was said by Mr. McNett. Alaska also points to the statements allegedly made by other supervisors and contends that such statements do not support the allegations made by the IAM.

Alaska makes the following allegations regarding the subcontracting of work:

1. Maintenance, being devastated by the strike, was forced to farm out much of its work at the strike's inception.

2. During the strike, Maintenance hired some 80 new mechanics to replace strikers.

3. At strike's end, Maintenance moved, as promptly as reasonably and safely feasible, to bring the work in-hours [sic].

4. At strike's end, a heavy training cycle occurred, as necessitated by the training of new hires and recurrent training of recalled ex-strikers.

5. Maintenance recalled 16 aircraft mechanics in the period July–September, 1985. All avionics mechanics were recalled by September 1985. Due to the hiring freeze, recalls slowed in the fall of 1985, but by November 1986 all ex-strikers had been given the opportunity to return to work in Maintenance.

6. The subcontracting effectively ended in October, 1985, just five months after strike's end.

7. During this five-month period, June–October, 1985, vast quantities of in-house work were performed.

8. During this five-month period, virtually all the disputed subcontracting was on just five aircraft.

   (a) Three aircraft leased to oil companies (314, 753, and 798), which were serviced every third or fourth week throughout the strike and until October, 1985 by Tramco at Paine Field, Everett, Washington.

   (b) Two aircraft (528D/298 and 528E/299) which Alaska had acquired from Nigerian Airlines and which underwent extensive preservice modification lasting two and three months, respectively.

The Carrier introduced substantial evidence in support of these positions.

Alaska recognizes the IAM's allegations concerning the use of temporary positions. The Carrier recognizes that extensive use was made of temporary positions, which by contract were limited to thirty days, except in certain medical leave situations prior to the strike. It is pointed up that when a temporary position ended, the individual in that position reverted to his or her former status. Alaska notes that during the past three years the IAM did not challenge the use or operations of temporary positions, and at the end of the strike Alaska was fully staffed for the summer of 1985 with permanent replacements.

It is urged that the Carrier did not step up its use of temporary positions, but in the fall of 1985 Fairbanks Station Manager made use of the new CBA right of ninety day temporary positions. The Carrier acknowledges that at this time the Fairbanks Station Manager increased the role of temporary positions, in lieu of overtime, to cover for extended employee absences at Fairbanks. The Company points up that these positions were given to the most senior ex-strikers awaiting recall, and this action was followed in Seattle.

Alaska points up that instructions were issued to offer the temporary positions to ex-strikers in seniority order. The Company alleges that while an ex-striker was in a temporary position, he was a working employee, and as such, was allowed to bid on vacant permanent positions. Alaska has dealt extensively with this matter and points up it has the contractual right to establish temporary positions, and that right was expanded in the 1985 negotiations to extend the thirty day temporary position to a ninety day temporary position. Alaska alleges that former strikers recalled to temporary positions had the right to bid on permanent vacancies. The Carrier alleges that the CBA's vacancy provisions refer to employees working

"at the station or at another station or on layoff" and such employees are eligible to bid on vacancies.

Alaska alleges that the use of temporary positions, including the overlapping of those positions, does not place a requirement on the Carrier to establish permanent positions. In regard to the procedures for temporary positions, the Carrier has alleged that written offer letters were used for temporary positions except in situations where the lead time was too short, and in this situation the contacts were made by telephone as a matter of necessity. It is urged that no prejudice ensued to the individual, and a lack of written notice was not Alaska's policy.

The Carrier recognized several issues raised by the Union, such as, Cross-utilization, New Hires, Elimination of Positions, Use of Overtime, Supervisors Performing Unit Work, Posting Practices and Bidder Eligibility. Alaska has gone into great detail in each of these subject matters and has addressed each of them extensively.

In conclusion Alaska alleges that the System Board is not empowered to rewrite the BTWA or the CBA but has the responsibility to give effect to the bargain made by the negotiating parties. On that basis it is alleged that the "Gibbs, *et al*" grievance be denied in its entirety.

OPINION

The parties have filed briefs and reply briefs. At the outset, the Board recognized the responsibilities and difficulties placed upon the shoulders of the Board members at the commencement of the hearing. As the hearing progressed, both the difficulties and the responsibilities increased. Upon the conclusion of the presentation of evidence, the Board commenced studying the testimony and evidence presented. Both parties have mentioned their 203 exhibits, but it should be

noted that exhibits averaged about 40 pages. It was necessary for the Board to examine those exhibits and to determine their weight and relevance.

It is now before the Board to decide the eight issues recognized at the commencement of this hearing. AS** has objected to one of the matters being presented, but it is the opinion of the Board that the Federal Court in Seattle directed this Board to rule on this issue as well. The Board has made every effort to reduce this opinion to its simpliest and briefest form. The point is stressed that each and every contention of the IAM and AS has been carefully studied and considered.

ISSUE NO. 1

Permitting junior employees and employees with no classification seniority to fill job openings and transfer between stations while more senior employees are awaiting recall.

The parties met in late April and early May for the purpose of discussing a back-to-work agreement. The Company presented the Union with a proposed back-to-work agreement, the terms of which are identical to the ultimate BTWA except that the BTWA's strike-end date and beginning-of-recall date are naturally later. The evidence indicates that at the conclusion of the meetings Union representatives stated: "Put any _____ thing you want in it. I have to sign it anyway." It is the opinion of the Board this constitutes an unconditional offer to return to work. Also it is pointed out to the Union that the strikers would be recalled in seniority order when there was an opening and prior to hiring a new hire. The Company

** Acronyms and abbreviations used extensively herein are as follows: Alaska Airlines (AS), International Association of Machinists and Aerospace Workers (IAM), Collective Bargaining Agreement 1985 to 1988 (CBA), Back-to-Work Agreement (BTWA), Mechanic and Related Personnel (MPR), Clerical, Office, Passenger Group Personnel (COPS), Railway Labor Act (RLA).

also advised the Union that the strikers would not be treated as furloughed employees but instead would be treated as awaiting recall. The CBA and the BTWA were signed on June 3, 1985.

At the end of the strike, maintenance work forces consisted of replacements and cross-overs. Cross-overs included those who did not strike and those who had struck but returned to work during the strike. The BTWA was agreed upon between the parties. The Carrier has urged that this went through negotiations, but the evidence establishes that there were, in fact, no negotiations, with very minor exceptions. AS presented the BTWA to the IAM, and in effect, stated that if you wish to return from strike, sign the BTWA. Paragraph 1.A of the BTWA is relied upon by AS, and it is stressed that striking mechanic, ramp service and related employees shall be recalled to service after the provisions within the agreement for the filling of vacancies have been completed but prior to the employment of new hires, in order of classification seniority as openings occur within classifications in which they hold seniority and shall be restored to work commencing with the most senior as of June 3, 1985; this process shall continue without displacing any employee from the payroll who is employed or who was given an offer of employment as of May 31, 1985.

AS has recognized the contention of the IAM that the action of the Carrier violated the RLA. AS alleges that this Board does not have jurisdiction to consider the RLA and has cited several decisions in support of that position.

The IAM contended that the Carrier granted super-seniority to non-strikers and to replacements which violates the express commitment to protect seniority rights of all the employees. The IAM has also alleged that such constitutes a violation of the non-discrimination provisions of the parties' agreement. The IAM has pointed to Judge McGovern's order

submitting this case and contends this order expressly raised a serious doubt as to whether AS' super-seniority plan comports with its RLA obligations.

The IAM has cited *ALPA v. United Airlines*, 802 F2d at 900. Therein the carrier permitted rebidding of pilot positions during the strike which permitted non-strikers to "leap frog over more senior striking pilots" for positions to be filled after the strike. The Court noted therein that filling post-strike positions was inherently unnecessary to continue operations during the strike. The Court held that since the carrier's motivation was anti-union *animus*, such act violated the RLA, even if the rebids were otherwise lawful as a matter of contract or statute.

The IAM also cited *Randall v. NLRB*, 687 F2d, 1240, 1243-44 (8th Cir. 1982) *cert. den.* 461 U.S. 914 (1983) wherein the 8th Circuit held that the employer violated the NLRA by implementing a striker recall plan which "reserved jobs in the higher classifications to non-strikers."

The IAM also cited *Flight Attendants v TWA*, 819 F2d, 839, 843-44 (8th Cir. 1987) wherein the Court held that the carrier violated the RLA by according permanent status to non-striker cross-overs. The 8th Circuit overruled the Federal District Court. The Court concluded that such conduct violated the Act because it "operated to the detriment of strikers as opposed to non-strikers." It should be noted that case is on appeal to the Supreme Court of the United States and *certiorari* has not been denied or granted.

The IAM also cited an arbitration opinion by Arbitrator Katz in *Copex Packing*, 83 LA 35, 37 (1984) wherein the arbitrator held that despite the existence of a special striker recall/bidding procedure, strikers should be permitted to actively bid on available positions pursuant to the parties underlying contract. It must be noted tht the arbitrator stated therein:

"Since the contract placed 'no limitation' on this right, no restrictions as to strikers could be implied." Herein the amended CBA does include this restriction.

The IAM has also cited Arbitrator Dworet in *Cellanese Corporation*, 13 LA 507 which held that the promise to "reemploy without discrimination" bars denying strikers use of seniority *vis-a-vis* non-strikers.

The IAM has also cited *Bethlehem Sparrows Point Shipyard*, 11 LA at 265 wherein the arbitrator held that "while the employer's argument for excluding strikers from the underlying contracts layoff provisions might be 'valid' . . . from a technical points [sic] of view, it misses the realities of the situation." This arbitrator further stated that absent an express contractual waiver, he concluded contract seniority articles apply to strikers.

The Board has considered all of the contentions and the arguments of the parties hereto regarding this issue. The Board is of the opinion that it has the right to rule upon violations of the RLA. This Board was established under the RLA. However, a decision on this issue does not necessarily have to rely on that basis.

The Board finds that the portion of the BTWA providing that striking mechanic, ramp service and related employees shall be recalled for service after the provisions in the agreement for the filling of vacancies have been completed, but prior to the employment of new hires, was made for the sole purpose of denying seniority rights to senior striking employees. The action itself speaks much louder than the evidence or testimony presented. The sole purpose of such an act resulted in the denial of seniority rights to the striking employees. This action indicates union *animus*. Neither can such actions be justified on an economic basis. The evidence establishes that AS had severe training problems throughout the period of time involved. The evidence also establishes that the granting of

prior seniority bidding rights to replacements and cross-overs resulted in much more training to qualify those employees for the vacant positions. Such action resulted in many of the strikers being denied the right to bid on a vacant position.

Randall Division of Textron, Inc. v NLRB, 687 F.2d 1240 (8th Cir. 1982) *cert. denied*, 461 U.S., held that the NLRB's decision that the employer's practice of offering "special-rated" jobs to employees already working rather than un-reinstated strikers unlawfully discriminated on the basis of union activity because Randall was offering an "additional preference besides permanence." The Board recognizes that *Randall supra* arose under the NLRA, and the parties were not bound by a closed shop agreement.

The 8th Circuit Court held that employees who are not working because of labor dispute remain "employees" of the Employer unless they obtain other work, 8th Circuit in *Independent Federation of Flight Attendants v TWA* 819 f2d, 839 (1987) *cert.?* [sic] The Board follows the findings expressed therein and holds that the striking employees remained employees and workers of AS, and as such, are entitled to bid on vacant positions as provided for in the agreement between the parties. Striking employees who obtained other employment are not in that category and were not entitled to bid on such vacancies.

The Board finds that AS violated the basic agreement between the parties and further violated the RLA by such actions. The Board directs AS to place all striking employees who were eligible to bid on vacant positions into those positions and to pay the loss of earnings which resulted therefrom. Unemployment compensation received during that time will be deducted from such an award. Striking employees who obtained other jobs during that period of time were not eligible to bid and are not included in this order. COPS employees are excluded.

ISSUE NO. 2

Utilizing management personnel, employees from outside the classification and/or bargaining unit, and new hires to perform bargaining unit work.

The Board recognizes that some management personnel was used in some outlying areas and some management personnel was also used in training employees. The Board has studied all of the evidence and testimony presented by the IAM. With one exception the evidence does not establish that AS violated the agreement in this manner. That one instance was the placing of Elmer Goodwin into a month long position which had been denied to a striker and then he was awarded an indefinite ramp position beginning October 12, 1985. That case may be presented as a separate grievance.

The evidence also establishes that two ramp service employees at Kotzebue were placed for a period of time between two weeks and one month before two former strikers were recalled. Those cases may also be submitted as separate grievances.

The remainder of all cases in this category will be denied on the basis that the evidence is insufficient to establish any violation of the agreement. The work of management personnel was either insufficient or was the same as had been followed by past practice or was used in training bargaining unit employees.

ISSUE NO. 3

Subcontracting bargaining unit work when there are available former strikers to perform that work.

The Board could use literally hundreds of pages addressing this subject matter. Certainly the evidence in this aspect of the case required days of study and consideration.

The subcontracting work occurred principally during a five month period of time and involved three aircraft leased to oil companies and two aircraft which had been acquired from Nigerian Air Lines and required extensive pre-service modification. That modification lasted two months for one aircraft and three months for the other. The evidence indicates that the five month period of time coincided with a heavy training cycle necessitated by the recalled strikers and requirements for training new hires. AS pointed up that new hires required training in virtually everything.

The evidence is convincing that the subcontracting effectively ended in October of 1985 and was justified under the existing circumstances. At the time involved, the work force was insufficient to perform the work. The agreement between the parties did not require AS to recall strikers to perform this work. Further it is noted that the agreement provides that AS may contract out any work when AS's personnel is not sufficient or available. The Board recognizes that striking workers were available, but under the circumstaces [sic] existing herein, AS was not required to recall striking employees to perform the work in the time frame involved herein. Consequently, that portion of the grievances is denied.

ISSUE NO. 4

Utilizing excessive overtime, and eliminating bargaining unit positions in order to avoid recalling strikers.

The Union's position and argument is recognized. There is nothing in the agreement between the parties which requires AS to establish new positions instead of assigning more overtime. The evidence establishes that in November of 1985 AS's operations at Seattle were severely impacted by snow over a two week period of time; the airport was closed, flights were diverted and schedules were disrupted. This situation required

the use of much overtime. In December of 1985 Seattle had an unprecedented fog siege which continued through December 25. Again, this fog required a great deal of overtime.

Under the agreement between the parties the striking employees were only entitled to bid on vacant positions. AS was not required to establish a vacant position in preference to the assignment of overtime. This section of the grievance will be denied.

ISSUE NO. 5

Permitting new hires with insufficient seniority to bid positions or upgrade to higher classifications in lieu of recalling strikers.

This issue will be sustained as outlined in Issue No. 1. The same order entered therein will be applicable to this issue.

ISSUE NO. 6

Utilizing temporary positions. This practice includes: (1) Creating numerous "temporary" positions as a blind to avoiding recognition of permanent work availability; (2) Denying temporary employees their right to exercise their seniority; (3) Arranging the bidding system to preclude temporary employees from bidding jobs; (4) Failing to recall employees in seniority order; (5) Requiring employees to sign forms waiving their seniority rights; (6) Failing to bulletin positions exceeding 90 days; (7) Denying temporary employees of their right to exercise their seniority for layoff and job bidding purposes.

There are seven sub-issues involved herein, and such has required the Board to extensively review the evidence and the exhibits submitted. The evidence of record establishes that the pre-strike agreement permitted the use of temporary positions. The BTWA increased the time of a temporary position from 30 days to 90 days.

The evidence reflects that the first real use of temporary positions was made in the fall of 1985 at the Fairbanks Station. The evidence indicates that the temporary positions were used in lieu of overtime to cover for extended employee absences at Fairbanks. Temporary positions were then used in Seattle; again, this was to avoid overtime. The Board has carefully examined all of the evidence and finds that the IAM has failed to prove a violation of sub-issues No. 1, 2, 3, 4, 5 and 7. The evidence establishes that in sub-issue No. 6 there may have been a few instances where AS bulletined temporary positions which exceeded 90 days, and those few cases constitute a violation of the agreement between the parties. The overlapping of temporary positions does not constitute a violation of this sub-issue. The IAM may submit individual cases wherein a bulletined position exceeded 90 days as an individual grievance.

The evidence submitted in sub-issues No. 1, 2, 3, 4, 5, and 7 is simply insufficient to establish the allegations. The temporary employees had no more or no less bidding rights than the strikers. Under the agreement between the parties after they completed their temporary assignment, they reverted to their former status. The evidence does indicate there may have been one or two instances where AS failed to recall employees in seniority order. However, the evidence indicates AS made a valiant effort to do so. Under the existing circumstances the Board finds no violation of the CBA. The evidence does not establish any individual employee who who [sic] was not recalled in seniority order.

After a careful review of the evidence, the Board finds that the only violations regarding temporary positions were two instances where AS may have failed to bulletin positions exceeding 90 days. Those grievances may be submitted to the Board for a determination.

Supreme Court, U.S.
FILED
AUG 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALASKA AIRLINES, INC.,
Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated DISTRICT LODGE 143, and its affiliated LOCAL LODGE 2202,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The district court issued two opinions in this case not cited by Alaska Airlines at page two of its certiorari petition and not reproduced in the appendix to that petition. These opinions are reported at 124 LRRM 2458 and 124 LRRM 2463, and are reproduced in Respondents' Appendices A & B ("Res. App. A" and "Res. App. B," respectively).

STATUTORY PROVISIONS INVOLVED

In addition to those provisions cited by petitioner, the statutory provisions involved in this case include 45

U.S.C. § 152 (Fourth) and (Eighth). These provisions are reprinted in Respondents' Appendix C.

STATEMENT OF THE CASE

Respondents International Association of Machinists and Aerospace Workers, AFL-CIO, and its affiliated Air Transport District Lodge 143 and Local Lodge 2202 ("Union") are labor organizations representing employees of Petitioner Alaska Airlines ("Airline"), an air carrier. In March 1985 the Union struck the Airline. During the strike the Airline hired permanent replacements, and continued to operate with these replacements along with union members who did not honor the Union's picket lines. The strike was settled in June 1985, at which time the parties signed both a new collective bargaining agreement and a back-to-work agreement. Appendix to the Certiorari Petition ("Pet. App.") A at 2.

This case arises out of a dispute over the interpretation of these two contracts. Specifically, the Airline interpreted the contracts to require that strike replacements and employees who worked during the strike should fill all post-strike job vacancies ahead of senior former strikers awaiting recall. The Union understood the contracts to require that new positions should be filled based on seniority, without reference to whether employees had been on strike.

The Court of Appeals correctly summarized the cause of the contractual ambiguity that led to the dispute:

> The back to work agreement provides that strikers will be recalled after Alaska complies with the provisions in the new collective bargaining agreement dealing with vacancies. Article 10 of the collective bargaining agreement states that a vacancy may be filled by a new hire or by an upgrade from a lower classification if "no qualified employees bid." *See*, E.R., Exhibit 19, at 10. Alaska contends that the term "qualified employees" does not include strikers; the Union contends that it does. [Pet. App. A at 8]

The term "qualified employees" is not defined in the contracts.

The Union filed this action in October 1985, challenging the Airline's interpretation of the contracts, and seeking to enjoin the Airline's implementation of its interpretation of the contracts until after the issue was resolved through arbitration before the System Board of Adjustment. The district court denied the injunction, finding no irreparable harm, while at the same time recognizing that the dispute was "essentially a minor dispute over contract interpretation." Res. App. B at 14a. That court recognized in particular that the parties disagreed over the proper definition of a "qualified employee" entitled to bid for job vacancies under Article X of the collective bargaining agreement. Res. App. A at 8a-10a. The district court accordingly held that the Union had "at least shown sufficiently serious questions going to the merits to make those questions a fair ground for litigation." *Id.* at 10a. Hence the court sent the matter to the System Board for resolution. *Id.* at 13a.

Before the System Board the Union pressed its argument that the contracts should be interpreted to give strikers recall rights according to their seniority. The Union also argued that any other interpretation of the two agreements would effectively punish strikers for engaging in a strike, and so would violate § 2 (Fourth) of the Railway Labor Act, 45 U.S.C. § 152 (Fourth), a statutory provision which by law is "made a part of the contract between the carrier and each employee and shall be binding over the parties" 45 U.S.C. § 152 (Eighth).

The System Board ruled for the Union. Pet. App. E. Addressing the Union's discrimination argument, the Board began its analysis first by stating that the Board "has the right to rule upon violations of the RLA . . . . However, a decision on this issue does not necessarily have to rely on that basis." *Id.* at 34. The Board then concluded that the back-to-work agreement as interpreted by the Airline, standing alone, "violated the basic agree-

ment between the parties and further violated the RLA" in that it discriminated against returning strikers. *Id.* at 35. The Board therefore ordered that former strikers were entitled to fill post-strike job vacancies on a seniority basis "as provided for in the agreement between the parties." *Id.*

The Airline at that point returned to the district court and filed a motion to vacate the relevant portion of the Board's order. That court granted the motion, concluding that the Board had based its award on the requirements of enacted legislation, and had "impermissibly used external sources" to interpret a contract provision that was unambiguous on its face. Pet. App. B at 6.

The Union appealed, and in an unpublished opinion, the Ninth Circuit reversed and reinstated the award. Pet. App. A at 2. The court of appeals rejected the district court's interpretation of the Board's award as having been based "solely on the RLA." *Id.* at 6. While recognizing that the Board's reasoning was not entirely clear, the court below understood the Board to have provided alternate grounds for its ruling:

> The Board did not, as appellee argues, base its decision "solely" on the RLA. While the order stated the Board's erroneous opinion that "it has the right to rule upon violations of the RLA", it also clearly stated that "a decision on this issue does not necessarily have to rely on that basis." E.R., Exhibit A, at 39.
>
> Given the Board's direct statement in its order that it was not relying solely on Alaska's violations of the RLA, the most reasonable reading of the order is that it is based on alternative grounds [one statutory, one contractual], each of which independently supports the Board's conclusion. At the very least, the Board's decision was ambiguous as to the extent of its reliance on the RLA. [Pet. App. A at 6].

Reviewing the contractual holding, the court of appeals then rejected the Airline's claim that the contracts taken

together were unambiguous and could be read only to support the Airline's position:

> The district court recognized the ambiguity of the recall policy in its original order, stating that neither the collective bargaining agreement nor the back to work agreement defined "qualified employee." E.R., Exhibit 19, at 10-11. It was the Board's duty to interpret this provision. *See, id.*, at 12. In doing so, it did not err in looking to the parties' intent and relevant case law to interpret the language of the agreements. [Pet. App. A at 8].

Relying on well-established precedents in this Court (and in the Ninth Circuit), the court below then ruled that since it was possible to construe the award as relying on the Board's interpretation of the relevant labor contracts, and since the Board offered a "plausible interpretation" of those contracts, it was error for the district court to vacate the award:

> The Board's award was based on the parties' collective bargaining and back to work agreements, and the Board did not exceed its jurisdiction in looking to the RLA, the parties' intent, or case precedent in interpreting the contracts. Given the degree of deference to be accorded the Board's contract interpretation, the award should not have been vacated. [Pet. App. A at 9].

Although it was not necessary to its decision, the court of appeals also determined that the Board would have had the "authority to look to the RLA in making its decision," even if that had been the only ground for its decision. Pet. App. A at 7.

ARGUMENT

I. THE FIRST QUESTION PRESENTED IS BASED UPON A MISREADING OF THE COURT OF APPEALS' DECISION AND IS NOT PROPERLY BEFORE THE COURT.

Petitioner's first question presented is "whether an airline labor arbitrator has the authority to nullify unambiguous contractual language on the basis of the putative requirements of . . . the Railway Labor Act." Pet. at i. In its petition the Airline explains that this question is present because "the Ninth Circuit recognized that the contractual language was clear and unambiguous" but "nonetheless declared that the System Board had the authority to ignore the clear contractual language and instead rely exclusively on the RLA." *Id.* at 3. *See also id.* at 8.

The short and sufficient answer to this question is that the Ninth Circuit recognized and declared no such thing.

The court of appeals *held* that the Board's decision rested on two independent grounds, one contractual, one statutory. *See* Pet. App. at 6. Reviewing the Board's contractual finding, the court below further held that the Board's interpretation of the contracts was a plausible one, and that the contracts taken together were ambiguous. Plainly, the court of appeals rulings in this regard are the kind case-specific, fact-based rulings this court does *not* sit to review.[1]

[1] Petitioner's real complaint, in fact, is not with the legal principles enunciated by the Ninth Circuit, but with its determination that the Adjustment Board's award was grounded in the contract. But the court's characterization is reasonable; indeed the Board itself stated that it need not make reference to anything but the two contracts to rule as it did, and concluded by ruling that the Airline's practice violated the labor agreement. As the court recognized, the most that can be said for the petitioner's assertion is that the award is ambiguous—it is arguably not entirely clear whether or not a ground for the Board's decision was contractual. That, however, was precisely the case in *Steelworkers v. Enterprise*

Based upon its analysis of the Board's ruling and of the relevant contract provisions, the court of appeals then affirmed the Adjustment Board's award on the basis of long-settled legal principles: that the standard of review of arbitration decision is "among the narrowest known to law," *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563 (1987), cited at Pet. App. A at 4, and that an award will be enforced so long as it even arguably "draw[s] its essence" from the parties' agreement. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), cited at Pet. App. A at 5. Plainly, in this regard, the ruling below is correct.

Indeed, the court of appeals explicitly recognized and accepted the precise legal principle petitioner in the first question presented claims that the court below rejected—

Wheel And Car Corp., 363 U.S. 593 (1960), where this Court ruled that "a mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." *Id.* at 598. *See also Paperworkers v. Misco*, 108 S.Ct. 364, 371 (1987) (award enforceable "as long as the arbitrator is even *arguably* construing or applying the contract") (emphasis added).

In any event, even if the Ninth Circuit's interpretation of the award was unreasonable—which it is not—its error would not warrant the granting of this petition. No legal issue would be decided were this Court to review the Ninth Circuit's decision to determine the accuracy of that court's characterization of a holding of a System Board of Adjustment.

Although not one of its questions presented, the Airline also objects to that part of the Ninth Circuit's opinion which states that the Board was entitled to rely exclusively upon the RLA in issuing its decision. *See* Pet. App. A-6 - A-7. That statement is plainly *dicta* or secondary holding, and is not necessary to the court's decision. The court's primary holding, stated at Pet. App. A-7 to A-9, and summarized in the opinion's concluding paragraph, was that the award drew its essence from the contract. Petitioner has suggested no reason why this Court should reach out and decide a question raised by a discussion not necessary to the decision below. *See, e.g., Norton v. Mathews*, 427 U.S. 524, 530 (1976); *Van Lare v. Hurley*, 421 U.S. 338, 344 (1975).

that an award "based on external legal sources, wholly without regard to the terms of the parties' contract" does not "draw its essence from the parties' agreement" and therefore is unenforceable. Pet. App. A at 5 (citations omitted). What the court of appeals squarely rejected was petitioner's claim that *this* award was such an award.[2]

II. PETITIONER'S CHALLENGE TO THE SUFFICIENCY OF THE ADJUSTMENT BOARD'S EXPLANATION OF ITS RULING RAISES NO ISSUE WORTHY OF PLENARY REVIEW.

Petitioner's second question presented asserts that the *real* reason for the Adjustment Board's ruling was the Board's belief that the back-to-work agreement violated the RLA. It is therefore an "abdication of [the reviewing court's] duty," petitioner claims, to "immunize" the award by relying on an "unstated" rationale that the award also can be justified in terms of the contract. Pet. at i, 17. There is no reason this Court should grant this petition to consider this issue.

1. First, in making this claim petitioner again misconstrues the decisions below. The contractual ground upon which the court of appeals relied in affirming the award was neither "unstated" in the arbitral award, nor was it insubstantial. The case was sent to arbitration only after the district court ruled that there was a question of contract interpretation to be decided by a Board of Adjustment. The issue presented to the arbitral panel to decide was: "Did the Company violate the Collective Bargaining

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[2] Although petitioner alleges a conflict among the courts of appeals on this question presented, it points to no cases creating such a conflict. Nor could it, for the legal principles concerning the judicial deference due to an arbitrator's interpretation of labor contracts are long-standing, well understood, and universally applied, by this Court, by the Ninth Circuit in this case, and by every other court of appeals.

Agreement and/or Back to Work Agreement?" Pet. App. E at 1. The Union's primary argument, exhaustively summarized in the Award, was contractual. And the award itself—though undoubtedly focused on an analysis of RLA principles—stated that the decision "does not necessarily have to rely" on any statutory ground, and concludes by stating that the Airline "violated the basic agreement between the parties" as well as the RLA. *Id.* at 34, 35. Though the Board's analysis is not perfectly clear, in the course of its discussion and conclusion the Board enunciated the central interpretive finding necessary to support its contractual holding; namely, that the collective bargaining agreement gave strikers the right to bid for vacant positions. Pet. App. E at 35.

This is *not* a case, in sum, in which the arbitral board attempted to insulate its decision by mouthing a contractual justification not present in the case, or in which the court of appeals fabricated a contractual rationale not relied upon by the arbitral panel.

2. Even on the assumption that petitioner correctly characterized the decision below, its second question raises no cert-worthy issue. The most petitioner can argue is that the court of appeals erred in enforcing an award on a ground referred to but not argued in detail in the arbitral award. Pet. at 21 & n. 11. That argument is doubly defective.

First, this Court has long since rejected the explicit premise of petitioner's argument; *vis*, that arbitral awards are enforceable only if the arbitrator exhaustively explains his conclusion and the explanation is "correct." To the contrary, "[a]rbitrators have no obligation to the court to give their reasons for an award." *Enterprise Wheel*, 363 U.S. at 598. *Accord Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 244 n. 4 (1962).[3] As the

[3] Conclusory awards are especially common in the Railroad Board of Adjustment. *See Union Pacific Ry. Co. v. Price*, 360 U.S. 601,

court below correctly recognized, so long as it can be determined that the arbitrator at least arguably grounded his decision on the labor agreement, the award should not be disturbed by the courts.

Moreover, having applied the correct legal standard, even if the court below had improperly applied that standard to the facts of this case—which it did not—petitioner suggests no reason for this Court to review this decision. Whether a decision "draws its essence" from the labor agreement or instead relies upon some improper extrisic ground ultimately is a factually-dependent determination made by the reviewing court. Courts for thirty years have been applying this standard to review arbitral awards, and there is no need now to review such fact-bound decisions.[4]

Nor is there anything about this case which suggests that review is particularly warranted here. In this regard, Petitioner points to three cases allegedly in conflict

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606 & n.4 (1959) (decisions are "customarily brief," "consisting of a sentence or two," making it difficult to determine the "real basis upon which the decision was reached.") (citation omitted).

[4] In the last term alone, this Court has denied *certiorari* in several cases challenging court decisions on the ground that an arbitrator's award either did or did not draw its essence from the labor agreement. Indeed, in one petition the "Question Presented" was virtually identical to the "Question Presented" in the instant case. *See Berklee College of Music v. Berklee Chapter of Mass. Federation of Teachers*, 858 F.2d 31 (1st Cir. 1988), *cert. filed*, No. 88-1828, 58 U.S.L.W. 3059 (Question Presented: "Is federal court reviewing arbitrator's decision under 29 U.S.C. 185 compelled to uphold decision if it can itself devise argument that it can 'imagine' could be accepted by 'some judges or arbitrators," even if argument was not relied on by arbitrator and even if arbitrator's decision exceeds arbitrator's authority and is contrary to plain language of underlying collective bargaining agreement?"), *cert. denied*, 58 U.S.L.W. (Oct. 2, 1989). *See also, e.g.*, No. 89-738, *Agipcoal USA, Inc. v. Mine Workers, cert. denied*, 58 U.S.L.W. 3427 (Jan. 8, 1990); No. 89-68, *Gonce v. Veterans Administration, cert. denied*, 58 U.S.L.W. 3240 (Oct. 10, 1989); No. 88-1901 *Air Line Pilots v. Delta Air Lines, Inc., cert. denied*, 58 U.S.L.W. 3218 (Oct. 2, 1989).

with this one. Pet. at 19-20. The cases are not in conflict; they demonstrate nothing more than that resolution of these claims call for a case-by-case analysis. In two of the cases, the reviewing courts found that the contract at issue unambiguously required a result opposite to that reached by the arbitrator. Here petitioner made the same argument, but the argument was rejected as a matter of fact by the court of appeals. *Compare Clinchfield Coal Co. v. Mineworkers*, 720 F.2d 1365, 1368 (4th Cir. 1983) (court found as a matter of fact that company leased "coal lands," not "coal mining operations" where contract unambiguously allowed it to do former and not latter) and *Young Radiator Co. v. Autoworkers*, 734 F.2d 321, 325 (7th Cir. 1984) (grievant admitted that he stole company property, arbitrator nevertheless refused to uphold his discharge even though the contract was unambiguous that theft was grounds for discharge under any circumstances). In the third case, *Ethyl Corp. v. Steelworkers*, 768 F.2d 180, 187 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986), the court enforced the arbitration award.

CONCLUSION

For the forgoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C85-2140M

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Plaintiff,

v.

ALASKA AIRLINES, INC.
Defendant.

ORDER

[Filed Aug. 25, 1986]

Before the Court is the third of a trilogy of cases arising from the 1985 strike by various unions against Alaska Airlines. This Court previously has considered motions filed by the clerical employees of the International Association of Machinists and Aerospace Workers (IAM) and the Association of Flight Attendants. Now before the Court is a motion by the mechanics unit of the IAM for a preliminary injunction against the airline.

The mechanics and the airline opened negotiations for a new contract in December 1983, and after exhausting the statutory procedures under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, the Union called a strike that began on March 4, 1985. During the course of the strike, Alaska hired hundreds of new employees it designated as "permanent replacements" for the strikers. Other positions were filled with existing employees who chose

to cross picket lines. The strike was settled on June 3, 1985, when the parties signed a new collective bargaining pact and a back to work agreement. The back to work agreement was drafted by Alaska, and provides for the recall of strikers in the order of seniority.

It is the Union's contention that from June 3, 1985 to the present, Alaska has refused to recall strikers with substantial seniority to available job openings and instead has filled openings with newly hired replacements with lesser seniority. The Union also says in the one year period after the strike, fewer than 10% of the strikers have been recalled to their former jobs.

Pursuant to the provisions of the Railway Labor Act, the Union filed a contractual grievance over the recall issue. According to the Union, Alaska has refused to expedite consideration of the grievance before the System Board of Adjustment, and also has twice declined to provide information essential to processing the grievance. The Machinists argue that because the grievance will not be decided by the System Board of Adjustment for at least six months and possibly longer, union members have lost their homes, cars, boats, and other possessions. All are seeking work with other companies, but many who have found such work have been forced to relocate. The Union seeks injunctive relief barring what it contends is a violation of the contract by the airline pending exhaustion of the grievance process.

DISCUSSION

The Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* and 181, *et seq.* specifies mediation and arbitration mechanisms to resolve labor disputes involving air carriers.

Under the RLA, all disputes arising between carriers and their employee unions either are major or minor. *Elgin, Joliet and Eastern Railway v. Burley*, 325 U.S. 711, 722-28 (1945), *affm'd on rehearing*, 327 U.S. 661 (1946). Minor disputes involve the meaning, interpreta-

tion, or proper application of existing collective bargaining agreements and are resolved through binding arbitration before a System Board of Adjustment. *IAMAW v. Aloha Airlines*, 776 F.2d 812 (9th Cir. 1985); *International Association of Machinists and Aerospace Workers v. Republic Airlines*, 761 F.2d 1836, 1389 (9th Cir. 1985). Both parties agree this case involves a minor dispute and therefore the System Board of Adjustment has exclusive jurisdiction over the merits of the claim. 45 U.S.C. § 184.

However, although the Union acknowledges that jurisdiction to interpret the merits exclusively is within the province of the System Board, it contends the Federal courts have the power to impose a status quo injunction to preseve the Board's jurisdiction. *Brotherhood of Railroad Trainmen v. Chicago R&I Railroad Company*, 353 U.S. 30, 42 (1957); *Brotherhood of Locomotive Engineers v. MKT Railroad Co.*, 363 U.S. 528 (1960). In *MKT*, the Court upheld a status quo injunction requiring the carrier to restore conditions which existed prior to the initiation of a minor dispute. The court approved the use of injunctive relief and required reinstatement of workers or payment of wages to those not reinstated. Recognizing that the grievance procedure before the System Board of Adjustment is time consuming, the court said it had to consider the hardships that might be imposed upon out of work employees if they were required to await the Board's sometimes long delayed decisions.

> Moreover, such an examination is inherent in the grant of the injunction itself. Yet it is settled, since *Chicago River* [*Brotherhood of Railroad Trainmen v. Chicago River and IND Railroad Co.*, 353 U.S. 30 (1957)] that an injunction may issue to preserve the Board's jurisdiction. We think that, in logic, we must hold that the conditions are proper also, at least where they are designed not only to promote the interests of justice, but also to preserve the jurisdiction of the board.

> It is not difficult to perceive how the conditions imposed in this case could be deemed to serve to protect the jurisdiction of the board. The dispute out of which the judicial controversy arose does not merely concern rates of pay or job assignments, but rather involves a discharge of employees from positions long held and the dislocation of others from their homes. From the point of view of these employees, the critical point in the dispute may be when the change is made, for, by the time of the frequently long delayed board decision, it might well be impossible to make them whole in any realistic sense. If this be so, the action of the district judge, rather than defeating the Board's jurisdiction, would operate to preserve that jurisdiction by preventing injuries so irreparable that a decision of the board in the union's favor would be but an empty victory.

363 U.S. at 534. The Union does not ask the Court to adjudicate the merits of this dispute. It only seeks to require the airline to return to the prestrike status quo pending resolution of the grievance procedure before the System Board of Adjustment.

Alaska asserts three arguments in opposition to Plaintiff's preliminary injunction motion: (1) that the Union has not satisfied the requisites for the issuance of a preliminary injunction; (2) that Plaintiff's injuries, if any, can be satisfied through an award of damages, and (3) that Plaintiff has demonstrated little or no probability of success on the merits.

Initially, Alaska argues that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, deprives the federal courts of jurisdiction to issue injunctions in labor disputes. However, the Federal courts have, with some consistency, recognized their power to issue preliminary injunctions in response to strike-related violations of the Railway Labor Act. *See Chicago and Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570, 575

(1971); *Railway Employees v. Florida East Coast Railway Co.*, 384 U.S. 238, 252 (1966). More recently, in *ALPA v. United Airlines*, 614 F. Supp. 1020 (N.D. Ill. 1985), the court found it had jurisdiction to scrutinize the conduct of an air carrier during a strike. Notwithstanding the jurisprudence to the contrary, Alaska asserts this action must be dismissed because the Norris-LaGuardia Act deprives the court of power to issue injunctions in labor disputes, particularly in cases where there is a peaceful dispute over arbitrable grievances. *Trans International Airlines, Inc. v. International Brotherhood of Teamsters*, 650 F.2d 949, 962-63 (9th Cir. 1980), *cert. denied*, 449 U.S. 110 (1981); *Amalgamated Transit Union Division 1384 v. Greyhound Lines, Inc.*, 550 F.2d 1237 (9th Cir. 1977); *see Boys Market, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970).

Alaska's reliance on the Norris-LaGuardia Act is misplaced. In *Chicago and NWR Co. v. Transportation Union*, 402 U.S. 570, 581-82 (1971), the Supreme Court said:

> We turn finally to the question of whether Section 4 of the Norris-LaGuardia Act prohibits the use of a strike injunction in all cases in violation of Section 2 First. The fundamental principles in this area were epitomized in *International Association of Machinists v. Street*, 367 U.S. 740, 772-773 (1961):
>
> > The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions. We have held that the Act does not deprive the federal court of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. (Citations omitted.) However, the policy of the Act suggests that the court should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right.

> . . . We find it quite impossible to say that no set of circumstances could arise where a strike injunction is the only practical, effective means of enforcing the command of Section 2, First. Accordingly, our prior decision lead us to hold that the Norris-LaGuardia Act did not forbid the district court from even considering whether this is such a case.

402 U.S. at 581-82.

Alaska asserts the Norris-LaGuardia Act deprives this court of the jurisdiction to *even consider* Plaintiff's request for a preliminary injunction. However, the Supreme Court has not read the Act as a total bar to a federal court considering a request for injunction. In light of the Supreme Court's interpretation of the Act, this court has jurisdiction to at least consider Plaintiff's contentions, and it is not necessary to summarily dismiss this action pursuant to the Norris-LaGuardia Act.

Alaska also argues that a preliminary injunction is inappropriate because it is an extraordinary remedy to be used sparingly and only in clear cases. *Anderson v. United States*, 612 F.2d 1112 (9th Cir. 1980). The elements a moving party must establish to be entitled to preliminary injunction are well settled in the Ninth Circuit. The moving party must show either: (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly or sharply toward the party requesting the preliminary relief. *Aguirre v. Chula Vista Sanitary Service and Sani-Taner, Inc.*, 542 F.2d 779, 781 (9th Cir. 1976); *Goldies Bookstore v. Superior Court*, 739 F.2d 466 (9th Cir. 1984).

In determining whether a status quo injunction should issue, this court first must determine whether Plaintiff has made a showing of probable success on the merits or sufficiently serious questions about the merits to make them fair ground for litigation.

The Union argues that Alaska's recall policy of granting "super seniority" to strike replacements and the constructive discharge of many strikers constitutes a *per se* violation of the Railway Labor Act. Alaska, however, says it is not required to fill job openings with strikers awaiting recall, but instead insists on the right to fill the openings with newly hired "replacements" and crossovers with lower seniority, even when those employees are not working in that job classification at the time the vacancy arises.

Primary strikes are a "protected concerted activity" under the Railway Labor Act, *Railway Employees v. Florida East Coast Railway*, 384 U.S. 238, 246-47 (1966), and employers may not discharge strikers. A strike "represents merely an interruption in the continuity of the [employer-employee] relationship." *Florida East Coast*, *supra*, 384 U.S. at 246. Although the Union does not directly address the question of whether the Airline had a right to hire permanent replacements, it does argue that Alaska has instituted a hybrid form of super seniority that gives permanent replacements and crossovers the first crack at specialty rated, high paying positions that prior to the strike would have been awarded to the employee with the highest seniority.

However, this case does not present a question of pure super seniority because it is arguable that Alaska has for all practical purposes permanently replaced a substantial number of its employees. That ultimate finding, however, is for the System Board, not this Court.

The airline now is offering lower classified or temporary positions to strikers who wish to return to work prior to the time the jobs are offered to new hires from outside the company. Alaska says it is complying with the terms of the Back-to-Work Agreement, which the airline interprets as only requiring strikers to be recalled "after provisions of the Agreement for the filling of vacancies have been completed." These provisions in-

clude Article X, Section 1 of the Agreement, which permits vacancies to be filled through promotions. In pertinent part, the Back-to-Work Agreement provides:

> 1a. Strike mechanic, ramp service and related employees shall be recalled for service after the provision within the agreement for the filling of vacancies have been completed, but prior to the employment of new hires, but in order of classification seniority as openings occur within classifications in which they hold seniority, and shall be restored commencing with the most senior as of June 3, 1985. This process shall continue without displacing any employee from the payroll who is employed or who was given an offer of employment as of May 31, 1985. Employees will be returned to work at the station where they were employed on March 3, 1985; if there are insufficient openings at that station, the employee may file a preference bid for other stations and shall then be selected for openings at those stations on the basis of classification seniority.
>
> b. It is specifically understood and agreed that the company has no obligation to return any person to work until there is an opening.

Back-to-Work Agreement at 46-47.

Alaska denies that it has refused to fill job openings with strikers awaiting recall. Instead, the carrier argues there only is a dispute over which strikers are entitled to recall and to which jobs.

To determine whether the Union has a probable success of succeeding on the merits or has raised sufficiently serious questions going to the merits to make them a fair ground for litigation, it is necessary to compare the Back-to-Work Agreement with provisions in the new collective bargaining agreement dealing with vacancies. The Back-to-Work Agreement merely provides that me-

chanic, ramp service and related employees are to be recalled to service after the provision within the main agreement for the filling of vacancies has been complied with, but before the employment of new hires. Article 10 of the collective bargaining agreement deals with the filling of vacancies. Subsection (i) of Article 10 says that a vacancy may be filled by a new hire or by an upgrade from a lower classification if "no qualified employees bid." Unfortunately, neither the collective bargaining agreement nor the Back-to-Work Agreement defines "qualified employee." However, an interoffice correspondence from Robert E. Gray, Alaska Airlines Vice President for Industrial Relations, to all supervisors of IAM employees, is revealing as to Alaska's position on the definition of the term "qualified employee." Exhibit C to Plaintiff's Memorandum in Support of Preliminary Injunction.

In the memo, Gray indicates that a "replaced employee" who was on strike and who wishes to return to the company has the right to be put on a preferential hiring list to be rehired ahead of any new applicant. But he says any promotional opportunities still may be filled from within. Therefore, only vacancies requiring the addition of new employees must be filled with returning strikers. It appears Alaska's definition of "qualified employee" does not include strikers. Instead, Alaska apparently believes that promotions first may be filled by replacements hired during the strike, and then by those returning from the strike.

The Union contends strikers should be reemployed according to seniority. That is, if a non-striking employee with less seniority and a striking employee with greater seniority are competing for the same job, it should go to the striking employee because of his or her greater seniority. But Alaska suggests the job first should be offered to the non-striking employee without regard to seniority. Then if there is an opening because of the

promotion of the non-striking employee, striking employees are to be reemployed according to seniority.

It is difficult to predict if the Union will prevail on the merits of its claim before the System Board of Adjustment. While the Union may not have adequately demonstrated probable success on the merits, it has at least shown sufficiently serious questions going to the merits to make those questions a fair ground for litigation. The reemployment scheme initiated by the airline is somewhat similar to a super seniority plan held illegal in *ALPA v. United Airlines, supra*, 614 F. Supp. 1020. In that case, the court found that an airline's post-strike "rebidding" of job vacancies, involving granting of permanent "super seniority" to nonstriking pilots, was unlawful under the Railway Labor Act. While it is true that the carrier has the duty to make all reasonable efforts to continue its operations during the strike, its power to make new terms and conditions governing the new labor force it hires is strictly confined within the RLA. The Act imposes upon the carrier the "twin obligations" to serve the public by reasonably attempting to operate during the strike and by reasonably attempting to maintain the employer-employee relationship. *Empress Ecuatoriana De Aviacion, S.A. v. District Lodge*, 690 F.2d 838 (11th Cir. 1982). The granting of post-strike promotional preferences to replacement workers may not have been "needed" for the continued operation of Alaska during the strike.

The fact that the new replacements now outrank the strikers will continue to disadvantage them for many years. And Alaska's implementation of its promotion policy has had an ongoing daily effect on job status, rates of pay, and benefits of both the nonstrikers, who will have the first opportunity at nearly every promotion, and the strikers, who for all practical purposes never will be able to obtain higher positions. In effect, strikers will be blocked from bidding for many of the best jobs in the

Alaska system. The court has serious questions whether this can be justified as a business necessity. Therefore, the Court finds that the Union has satisfied the first element of the second *Aguirre* test by having shown that there are sufficiently serious questions going to the merits to make them a fair ground for litigation.

Secondly, the Union must show possible irreparable harm or a balance of hardships tipping decidedly toward it. The Union contends Alaska's recall policy has had a devastating impact: fewer than 10% of the strikers at three locals have been recalled to permanent positions. Because of the recall policy, the Union says its members have lost key possessions, including their homes. It argues that its members have been forced to relocate to find work or have had to accept part-time, low paying positions. Others have no job at all. All allegedly are losing and continue to lose valuable job experience essential to their careers. The Union contends such hardships cannot adequately be redressed by a favorable decision of the System Board and that an award of back wages cannot compensate for the purported trauma of a prolonged period of unemployment or for forced dislocation. The Union also argues that injunctive relief will not prejudice Alaska because requiring the recall of strikers before promoting from within will not increase its payroll.

The Airline suggests that if the System Board determines Alaska has not complied with the terms of the contract, the injury can be satisfied by an award of damages. Alaska argues that because reinstatement to previous positions, coupled with back pay, would redress any alleged wrongs to the replaced strikers, a preliminary injunction is inappropriate. *See, Sampson v. Murray*, 415 U.S. 61, 89-90 (1974); *VanArsdel v. Texas A&M University*, 628 F.2d 344 (5th Cir. 1980).

A Court recently was faced with a similar situation in *TBI v. Pan America World Airways, Inc.*, 607 F. Supp.

609, 613 (E.D. N.Y. 1985). In that case it was held that an adjustment board decision in favor of the union could be compensated by money damags.

> While the availability of monetary relief at a later date must surely be a little comfort to those out of work employees faced with immediate financial hardship, the law is clear in this circuit that lost wages do not constitute irreparable harm where the financial injury falls on an easily ascertainable group of employees capable of ultimately being redressed.

607 F. Supp. at 613.

The Union's claim here must succeed or fail on the question of whether the purported harm can adquately be compensated by monetary damages. The Court has thoroughly examined the record before it and finds only the affidavit of Marvin Sandrin, a union official, to support the claim that union members have lost their homes, cars, and other possessions. While clearly the loss of valued possessions is at best unpleasant, it is not irreparable. Monetary value can be placed on homes, cars, and boats. Therefor, if union members were wrongly dispossessed of those items by Alaska's actions, an award of damages can make them whole again. Likewise, the purportedly lost job experience not only can be compensated by a monetary award, but also by reinstatement with seniority and back pay. That leaves the alleged trauma resulting from losing a job and possessions, or from having to relocate, or from taking a lower paying position. First, the Court notes that it has *no evidence whatsoever* before it showing union members have suffered trauma. However, assuming *arguendo* that individual members have suffered trauma sufficient to entitle them to damages, the Court believes that injury adequately can be redressed by monetary damages. The Court agrees with Judge McLaughlin's reasoning in *IBT v. Pam Am. supra*, that while the availability of monetary relief at a later date may be of little comfort to

out of work Alaska employees, it is well-settled when damages purely can be compensated by a monetary award, such damages are not irreparable. *Los Angeles Memorial Coliseum v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980); *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1121 (9th Cir. 1984). Without question, lost wages and lost possessions are compensable with money. Lost seniority is as easily compensable by reinstatement with seniority. And this Court finds that any purported trauma, if it exists at all, also is compensable with money damages.

Furthermore, the mechanics unit of the IAM is an easily ascertainable group of employees capable of ultimately being redressed if that is the decision of the System Board. Accordingly, the Court finds that the Plaintiff has failed to show possible irreparable injury or a balance of hardships tipping sharply towards it and therefore is not entitled to preliminary injunctive relief.

Although the Union is not entitled to injunctive relief, this matter will not be allowed to drag on indefinitely. Therefore, the parties shall submit this matter to the five-member System Board of Adjustment within 60 days of the entry of this Order.

Consistent with the foregoing, the Motion of Plaintiff for a Preliminary Injunction is DENIED.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED the 25th day of August, 1986.

/s/ Walter T. McGovern
WALTER T. MCGOVERN
Chief United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C85-2140M

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated DISTRICT LODGE NO. 143, and its affiliated LOCAL LODGE NO. 2202,

Plaintiff,

v.

ALASKA AIRLINES, INC.,

Defendant.

ORDER

[Filed Nov. 6, 1986]

Despite the best efforts by this Court to resolve this lengthy and often times bitter dispute between the Union and Alaska arising out of a 1985 strike, this Court once again is asked to make a decision in what essentially is a minor dispute over contract interpretation.

The history of this litigation was set forth in the order denying the Union's motion for preliminary injunction. Presently before the Court is the motion of Alaska for clarification of the Court's order of August 25, 1986.

On June 17, 1985, the Union filed a grievance on behalf of Thomas M. Gibbs, et al., No. 27988, claiming that the manner in which Alaska recalled strikers violated the back to work agreement. In its moving papers, the Union referred the Court specifically to the Gibbs grievance.

The Union sought to enjoin Alaska's recall procedures "pending exhaustion of the contractual grievance process." Although the Court denied the Union's motion for preliminary injunction, it ordered the parties to submit this matter to the five-member System Board of Adjustment within 60 days of entry of the Court's order.

Despite the order, one or both of the parties submitted this grievance to a four-member System Board on September 4-5, 1986, apparently to protect the record.

Alaska says the Union reads the Court's order as expanding the substantive scope of the Gibbs grievance to include all Union claims which are in any way related to the strike or the back to work agreement, whether originally raised by the Gibbs grievence or not. The carrier contends this interpretation confers remedial jurisdiction upon the System Board purportedly different from that authorized by the collective bargaining agreement.

Alaska, on the other hand, says the order directs the parties to submit only the Gibbs grievance to the System Board for arbitration. It contends the order does not rewrite the Gibbs grievance or the parties' collective bargaining agreement. Nor does the order rewrite the charter of the System Board. The airline argues that the order simply directs the parties to proceed within a fixed time frame to present the Gibbs grievance to the five-member System Board. It says procedural, substantive and remedial provisions of the collective bargaining agreement regarding grievances and System Board hearings remain in full force and effect.

The Union takes a different view of the Court's order. In its complaint, the Union claimed Alaska promoted persons in lower work classifications in lieu of recalling eligible former strikers, and gave replacements and nonstrikers superseniority for job bidding purposes. The Union also alleged that Alaska refused to provide documents critical in processing contractual grievances. Be-

sides copies of the Gibbs grievance, which broadly challenged Alaska's recall policies, the Union also provided evidence of Alaska's alleged wrongful bidding practices, promotional practices, purported refusal to provide documents, and the consequences of those actions for employees who participated in the strike.

Alaska's motion to clarify raises two issues requiring separate consideration. First, Alaska appears to contend that it should not be required to arbitrate the promotion, job bidding or recall dispute issues, but instead only should be required to arbitrate specific purported contractual violations that allegedly occurred in the two weeks immediately following the strike. The Court is at a loss to explain how Alaska possibly could read the order so narrowly. No where does the Court's order refer specifically to the Gibbs grievance. The gravamen of the Union's complaint, and the specific subject matter of the motion for preliminary injunction, is the Alaska recall policy. The Union filed a contractual grievance over that recall policy. The Gibbs grievance alleges a violation of the back to work agreement based upon the recall policy.

At a hearing held by a four-member System Board of Adjustment, counsel for the Union stated it was his understanding that the Gibbs grievance was a class action challenging certain practices of Alaska, which he claimed were designed to preclude former strikers from returning to work and to otherwise discriminate against them in violation of the contract. It was the Union's position that the grievance was broadly worded to encompass the purported continuing violation of the back to work provisions dealing with recall of former strikers, including the use of temporary positions. The Union's position substantially comports with the ruling of the Court. Moreover, the Court is unable to determine exactly what issues Alaska does not want the System Board of Adjustment to adjudicate.

So that there is no further dispute about the breadth of the Court's order, the five-man System Board of Adjustment shall, in accordance with its normal procedures, hold a hearing and issue a ruling on the disputes involving *all issues* related to the recall of strikers covered by the Mechanics Union contract with Alaska Airlines following the 1985 strike. The System Board of Adjustment shall consider the mandate of this Court to be broad enough to cover all issues in dispute, including the use of temporary employees, if the Board shall find that such a use violated the agreement between the parties. The Court finds without merit Alaska's argument that the preliminary injunction request only was related to the Gibbs grievance, and notes that the exhibits submitted in support of the motion for preliminary injunction make it clear that the issue before the Court involved all aspects of Defendant's recall policies.

The second issue raised by Alaska's memorandum is whether the Court intended to give the System Board power to award compensatory damages, should it decide that Alaska's conduct was wrongful. It is unclear from the agreement between the parties whether the System Board has the authority to award compensatory damages. The agreement clearly provides that the System Board may make an "award." The Railway Labor Act, 45 U.S.C. § 184, does not define the limitations of a System Board sitting in a case such as this. However, it is implicit that the term "award" is broad enough to encompass the damages sought by the Union. Additionally, insofar as this Court has retained jurisdiction over these proceedings, any award would be reviewable if either party, or both, was dissatisfied with the result reached by the System Board.

Accordingly, insofar as Alaska's motion can be construed as being one to limit the scope of the Court's order of August 25, 1986, the motion is DENIED.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED the 6th day of November, 1986.

/s/ Walter T. McGovern
WALTER T. MCGOVERN
Chief United States District Judge

APPENDIX C

STATUTORY SUPPLEMENT

45 U.S.C. § 152

* * * *

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * *

Eighth. Notices of manner of settlement of disputes; posting. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

ISSUE NO. 7

Repudiating the contractual bidding system by failing to bulletin jobs or awards.

There is no evidence to establish that there was any violation of the CBA in the manner in which the jobs or awards were bulletined or not bulletined.

ISSUE NO. 8

Recalling employees to work out of seniority order.

The evidence submitted herein does not establish that striking employees were recalled to work out of seniority order. However, if there are individual instances, such should be submitted to the System Board.

CONCLUSION

The Board will retain jurisdcition [sic] in this case. If there are specific issues not answered by this opinion, those specific issues will be addressed by the Board. Furthermore, the Board will retain jurisdiction to hear individual disputes arising out of this opinion. This does not result from a desire of the Board to hear such cases. This decision was based upon the order of the Federal Court directing that all issues arising out of the "Gibbs *et all* [sic]" grievance be submitted to a System Board. Also, it was the opinion of the arbitrator that perhaps such grievances could be resolved more expeditiously by this Board than by creating another board. The arbitrator herein is not only willing but would be pleased if the individual grievances were submitted to another System Board.

The parties are directed to comply with the above award as stated.

s/Preston J. Moore
Neutral Member

Company concurs on issues #2, 3, 4, 6, 7 and 8.

s/William MacKay
Company Board Member

Company dissents on issues #1 and 5.

s/Gail Neufeld
Company Board Member

s/Carolyn Moe
Union Board Member

Union concurs in part and dissents in part.

s/Suzie Welch
Union Board Member

March 1, 1988